82-830

No. ——

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IN THE

Supreme Court of the United States

October Term, 1982

MOSHE MENORA on behalf of SHOLEM MENORA, a minor; GILDA ALLSWANG on behalf of RONALD ALLSWANG, a minor; RABBI ABRAHAM BRUCKENSTEIN on behalf of RONALD BRUCKENSTEIN, a minor; BERTON WEINER on behalf of MICHAEL WEINER, a minor; DR. BERNARD SERED on behalf of MITCHELL SERED, a minor; HEBREW THEOLOGICAL COLLEGE, INC.; and IDA CROWN ACADEMY OF ASSOCIATED TALMUD TORAHS, INC.; individually and on behalf of all others similarly situated,

Petitioners,

v.

ILLINOIS HIGH SCHOOL ASSOCIATION, an unincorporated association and LAVERE L. ASTROTH, in his official capacity,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SYLVIA M. NEIL
SHIRLEY R. DVORIN
American Jewish Congress
22 W. Monroe Suite 2102
Chicago, Illinois 60603
(312) 332-7355

DAVID A. GROSSBERG
30 North LaSalle Street
Chicago, Illinois 60602
(312) 580-2036

NATHAN Z. DERSHOWITZ
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-2500

Counsel for Petitioners

QUESTIONS PRESENTED

1. Did the Court of Appeals err in shifting to petitioners the burden of initially demonstrating that no alternative forms of religious observance could be devised which did not conflict with the state's interests?

2. Did the Court of Appeals err when it overturned the District Court's findings of fact without applying the clearly erroneous rule, on the ground that the clearly erroneous rule does not apply to facts it characterized as "legislative" as opposed to "historical"?

3. Did the Court of Appeals err in determining that the state's interest was compelling by considering only the abstract reasons which motivated adoption of the rule, rather than the District Court's factual findings that the rule as applied to petitioners did not in practice advance that interest?

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CONSTITUTIONAL PROVISIONS AND RULES

U. S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

Fed. R. Civ. P. 52 (a):

> [F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses....

National Federation of State High School Associations (Federation) 1980-81 Basketball Rule 2-2:

> The referee shall not permit any players to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Barrettes made of soft material are legal. Head bands no wider than two (2) inches made of non-abrasive unadorned, single color cloth, fiber, soft leather, pliable plastic or rubber are legal.

Federation 1981-82 Basketball Rule 3.5:

> The referee shall not permit any players to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Head bands no wider than two (2) inches made of non-abrasive unadorned, single color cloth, fiber, soft leather, pliable plastic or rubber are legal.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reported at 683 F.2d 1030 (7th Cir. 1982).* Its initial opinion is reprinted in the Appendix at 1a with the dissent appearing at 26a. The opinion denying the petition for rehearing is reprinted at 1b. The opinion of the United States District Court for the Northern District of Illinois is reported at 527 F. Supp. 637 (N.D. Ill. 1981) and is reprinted at 1e.**

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* Petitioner, Hebrew Theological College, Inc. is a not-for-profit corporation. Petitioner Ida Crown Academy is a school of the Associated Talmud Torahs, Inc., a not-for-profit corporation. There are no parent, subsidiary or affiliated companies.

** The reported opinion of the United States District Court of Respondents' motion for recusal is no longer at issue in these proceedings. The recusal decision is reported at 527 F. Supp. 632 (N.D. Ill. 1981).

JURISDICTION

The judgment of the Seventh Circuit was filed June 30, 1982. A timely petition for rehearing was denied with dissent on August 18, 1982. This petition is filed within ninety days of that denial. This Court has jurisdiction under 28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

Petitioners, two Orthodox Jewish high schools and members of their interscholastic basketball teams, brought suit against the Illinois High School Association (IHSA), the organization that regulates interscholastic basketball in Illinois, charging that the IHSA's rule prohibiting players from wearing headgear violated the players' Free Exercise rights. The individual petitioners alleged that, as male members of the Orthodox Jewish faith, they are required, with limited exceptions not relevant here, to cover their heads at all times as a sign of respect to G-d, in whose presence they believe themselves always to be. The sincerity of their religious belief is unchallenged.

The schools, Ida Crown Academy and the Hebrew Theological College, had played interscholastic basketball under the auspices of the IHSA for eight years and

three years, respectively. This case arose when the IHSA decided to enforce against petitioners its rule prohibiting all headgear (except headbands) during basketball play* and informed petitioners that they

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* Rule 2-2 provided:

> The referee shall not permit any players to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Barrettes made of soft material are legal. Headbands no wider than two (2) inches made of non-abrasive unadorned, single color cloth, fiber, soft leather, pliable plastic or rubber are legal.

The provision permitting soft barrettes was deleted from the rule after the District Court entered temporary injunctive relief and found that, for safety purposes, a yarmulke is the functional (although not the religious) equivalent of a soft barrette. The District Court pronounced itself troubled "to encounter what appears to be a pretextual basis" for deletion of the soft barrette exception. (13-20e; 24-25e; 37-40e).

would not be allowed to participate in interscholastic basketball unless the team members played without yarmulkes (skull caps), the traditional headcovering of Orthodox males. (13e).

Up to that point, petitioners had fulfilled their religious obligation by wearing yarmulkes secured by several bobby pins or clips during basketball play. They asked the IHSA to waive its headwear rules for them and to permit them to wear securely fastened yarmulkes, but the IHSA refused to permit any headcovering not specifically permitted by its rules. In February 1981, Rabbi Jerald Isenberg, the assistant dean of students of Hebrew College wrote the IHSA seeking clarification of the headwear rule. In response, IHSA wrote

> It is the opinion of the IHSA that skull caps, securely fastened would be a violation of 1981 National Federation Rule 2-2 and we cannot waive the rule. (Emphasis added.)

On February 19, 1981, the IHSA requested an interpretation of the no-headwear rule from the National Federation of State High School Associations (Federation) which drafted the basketball rule book used by the IHSA:

> Would rule 2-2 allow skull caps to be worn if they were not attached by bobby pins or other types of clips which could be judged as hazardous?

The Federation's response was short and to the point:

> [S]ince headwear, other than a headband, is illegal the method of attachment is not a concern.

(15a; 27-9a).

Throughout the proceedings, the repondents have maintained this position.*

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* See testimony of respondents' witness, Richard O. Schindler, (editor of basketball rule book), TR. 29, p. 25-6, 34; Respondent's Response to the Motion for a Temporary Restraining Order.

On February 23, 1981, the District Court, whose jurisdiction was invoked pursuant to 28 U.S.C. § 1343(3), entered a temporary restraining order enjoining the respondents from prohibiting petitioners' participation in interscholastic basketball. On November 3, 1981, the case for permanent declaratory and injunctive relief was tried, pursuant to Fed. R. Civ. P. 65(a)(2). On November 17, 1981, the District Court entered findings of fact and conclusions of law, pursuant to Fed. R. Civ. P. 52(e).

The District Court found, as fact, that interscholastic basketball competition, the sole interscholastic athletic activity of the two schools, is an important educational experience that contributes to the physical and emotional health and development of students and that the schools' inability to participate in

interscholastic basketball would have a material negative impact on the schools and their students. (11-12e). The court further found that slips and falls are common in the game of basketball. There was, however, no evidence of even a single instance of slipping resulting from a yarmulke, hair clip or bobby pin, and, indeed, testimony by witnesses with substantial experience in coaching, observing and refereeing thousands of basketball games in which players on one or both teams wore yarmulkes reflected not a single instance of either slippage or injury from either yarmulkes or their associated bobby pins or clips. (20-23e). The Court also found that ISHA had not adopted all feasible rules to improve safety. (23-25e; 36-37e). On that record, the Court concluded that the risks posed by yarmulkes and their appurtenances are totally speculative.

The District Court concluded that IHSA had not shown a compelling interest in safety which would outweigh the petitioners' First Amendment rights. The Court ordered the IHSA to allow the petitioners to participate in interscholastic basketball without requiring them to remove head coverings worn in accordance with their religious beliefs. (33-34e; 39-40e; 43e).

The Court of Appeals for the Seventh Circuit reversed, over a dissent, vacated the District Court's decision and remanded the case.

The majority stated the question presented to it was an asserted "religious . . . obligation while playing basketball to

wear a yarmulke fastened to [the] hair by bobby pins." (Court's emphasis) (13a). Adopting a concept from the jurisprudence of conflict of laws, the court ruled that the case presented a "false conflict" because the petitioners

> have no constitutional right to wear yarmulkes insecurely fastened by bobby pins.

Expressly rejecting uncontroverted evidence in the record, and ignoring the clear language of the rule, the majority opinion assumed that the IHSA did not prohibit the wearing of secure headcoverings. (15 a). Notwithstanding the IHSA's unbending position and its strict adherence to the letter of the rule, the Court was "reasonably sure that a secure headcovering exists or can be devised at trivial cost without violating any tenet of Orthodox Judaism." (15a).

The majority asserted that the purpose of the no headwear rule is to promote safety (6a). It stated that it did not consider IHSA's failure of proof regarding the hazards of yarmulkes on the basketball court "quite so devastating" as the District Court did. (17a). The majority found that "affixing of the yarmulkes to the head (more precisely, the hair) by bobby pins. . . happens to be an inherently insecure method of keeping the yarmulkes atached during basketball play." (3a; 14a). Contrary to the District Court's explicit factual findings, the majority found that yarmulkes so fastened fall off in the heat of play with some frequency. (3a). It maintained, again contrary to the District Court, that experience with interscholastic basketball games in which players wear yarmulkes has been limited and that "we do not know how many of the

falls that occur in games when players are wearing yarmulkes are due to that fact -- we do not even know whether falls are more common in such games -- than in games where the IHSA's rule is enforced." (17-18a).

The Court stated

> [T]he plaintiffs had the burden of proving that their first amendment rights were infringed by the association's no-headwear rule, we are constrained on this record to conclude that they failed to make out a case. (21a).
>
> . . .
>
> If the plaintiffs can totally allay the state's safety concern at zero, or practically zero, cost to them, they must do so. Otherwise the state's concern, even if relatively slight, will be a compelling interest in relation to the (non) burden on the plaintiffs' religious freedom. (20-21a).
>
> . . .
>
> The District Court should retain jurisdiction so that the plaintiff can have an opportunity to propose to the Association (IHSA) a form of secure head covering that complies with Jewish law yet meets the Association's safety concerns. If the Association refuses to interpret or amend its rules to allow such a head covering to be worn by Orthodox Jews, the District Court should then proceed to determine, consistently with the analysis in this opinion, the plaintiffs' right to have the rule enjoined as a violation of their religious freedom. (21-22a). . . .

> We put the burden of proposing an alternative, more secure method of covering the head on the plaintiffs rather than on the defendants because the plaintiffs know so much more about Jewish law." (22a). (emphasis added)

The dissent rejected the majority's assertion that petitioners alleged a "non-existent burden" when they were denied an exception to the no-headgear rule. (27a). The dissenter stated that:

> the conclusive and unambiguous ruling by the Federation was that all head-wear, other than headbands, is illegal regardless of the method of attach-ment. (emphasis in original). (28-29a),

and that he was "not prepared to second-guess Judge Shadur's evaluation of the alleged safety hazards. (30-31A). Furthermore, the dissent maintained that the majority "overlooked" prevailing principles of constitutional law by placing the burden of accommodation on petitioners rather than IHSA. (30a).

In an opinion denying petitioners' request for a rehearing in this case (again over dissent), the Court of Appeals explained that the clearly erroneous rule for overturning the District Court's findings of fact was inapplicable because that rule was designed for historical facts not "legislative" facts. (2-3b). The Court of Appeals, noting the importance of the issue, also elaborated on its ruling regarding burden of proof, stating:

> "We placed on the plaintiffs only the burden of demonstrating that there is in fact a conflict between the state's interest in safety and their interest in complying with all those requirements of Jewish law. If they can comply fully with all those requirements yet still meet fully the state's concern with safety, . . . then they would not be accommodating their religious beliefs to secular commands...." (4-5b). (emphasis added)

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue because the Court of Appeals for the Seventh Circuit decided this case by applying novel and unprecedented theories involving the allocation, as well as the extent of, the parties' burdens in a case raising claims under the Free Exercise Clause. The Court below imposed upon a plaintiff the burden of proving that no accommodation of his religious practices was possible.

It also substantially reduced the state's burden in such cases by holding that the District Court was obligated to weigh the state's interest, not in light of the actual operation of its rule, but upon the "legislative" facts which moved the state to impose the rule in the first place. Finally, it ignored the limitations on appellate review imposed by Fed. R. Civ. P. 52(a), holding the clearly erroneous

rule inapplicable to "legislative" facts, and overturning findings that were not "legislative" without applying the rule.

The implications of the majority's constitutional analysis for future Free Exercise cases, together with its unprecedented expansion of the scope of appellate review of factual determinations, establish that this case is sufficiently important to justify the issuance of the writ of certiorari.

I. The Decision of the Court of Appeals Placing the Burden of Proof on Petitioners is Inconsistent with the Prior Decisions of this Court

The decision of the court below conflicts with the decisions of this Court in cases arising under the Free Exercise Clause. This Court has imposed only one burden on a plaintiff in a case such as this -- that of demonstrating a conflict between a religiously motivated practice and some governmental requirement. Once that burden has been met, this Court has placed the burden of showing that the

state's interests are sufficiently compelling to justify the restriction on religious freedom and that the practice is the least restrtictive means of fulfilling that interest where they logically belong -- on the state.

The court below radically shifted this allocation of burdens. It recognized that petitioners' religious observances were in conflict with the IHSA's rule prohibiting all headwear -- a rule the record shows respondents have obstinately refused to modify or waive to accommodate petitioners' religious practices.

Yet the court below refused to decide the only question left in the case -- whether the interest served by the no headwear rule was sufficiently compelling, given the overwhelming, uncontradicted factual showing that the fear of accidents was speculative, to outweigh plaintiffs'

Free Exercise rights. Rather, the court below required petitioners to prove, as a preliminary matter, that no accommodation of their religious belief and the safety interest which gave rise to the rule was possible. In doing so, it relied on the conflicts of law theory of "false conflicts." The Court of Appeals cited no authority for the application of this rule to Free Exercise cases.

The procedure this Court has established for Free Exercise Clause cases is illustrated by Wisconsin v. Yoder, 406 U.S. 205 (1972). This Court, stating that only compelling state interests are sufficient to override a Free Exercise claim, held that once the plaintiffs had established a conflict between state law and their practices it fell to the state to prove that its interest was superior:

> It was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

Accord, Thomas v. Review Board of the Indiana Employment Security Div., 450 U.S. 707 (1981).

And in Sherbert v. Verner, 374 U.S. 398, 407-08 (1963), this Court thought it to be "plainly . . . incumbent upon [the state] to demonstrate that no alternative forms of regulation would combat . . . abuses without infringing First Amendment rights."

The parties in the District Court followed the burdens set forth in Yoder and Sherbert. Petitioners proved that the practice of covering their heads while playing basketball was in conflict with the IHSA's rule prohibiting headwear. The IHSA asserted an interest in preventing accidents. Petitioners challenged this interest by evidence suggesting that it was not advanced by the rule. The District Court found as a fact that the state's interests were not advanced by the rule.

The Court of Appeals departed from this framework, holding that petitioners had not proved, as a preliminary matter, that no accommodation of their religious beliefs was possible. This holding flies in the face of the parties' factual stipulation and the District Court's independent finding of fact.

More to the point, this additional burden of proof, while subtle in appearance, is radical in its implications. The existing formulation deals with identifiable conflicts between religious practices as observed by adherents of a particular faith, and an identifiable government policy. The Court of Appeals' formulation requires the parties to produce proof, and a court to determine, whether there are alternative observances which would both satisfy religious requirements and the state's interest. Indeed the court below undertook such an inquiry (3a, 13-14a, 23a).

If this new burden of proof is to be more than a pro-forma burden of pleading, a court would be required to pass on the correctness of plaintiffs' assertions that no other practice will satisfy their religious beliefs. Such an inquiry is forbidden by Thomas. See also U. S. v. Ballard, 322 U.S. 78 (1944); Cf. Sherbert v. Verner, supra, 374 U.S. at 407. No case decided by this Court has ever imposed such a burden of proof on a Free Exercise claimant.*

Exacerbating the new burden on courts and parties to explore alternative forms of observance is the insistence that the religious observance and its alternatives be measured not only against the official formulation of the governmental policy, but

* The lower federal and state courts have held that the burden of seeking out, or devising, accommodation of an employee's religious practices as mandated by Title VII of the 1964 Civil Rights Act, is upon the employer. Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978); Schweitzer Aircraft Corp. v. S.D.H.R., 48 N.Y. 2d 294 (1979).

against the underlying interest which finds expression in the formal policy. One can easily imagine, under this rule, a motion to dismiss at the end of the plaintiff's case because he speculated incorrectly about the nature of the state's interest. In Sherbert v. Verner, 374 U.S. 398 (1963), for example, the interest asserted by South Carolina before this Court was different from the interests it asserted below. 374 U.S. at 407.

The rule adopted by the court below was advanced as a method to avoid a constitutional adjudication. (22a). See Ashwander v. T.V.A., 297 U.S. 288 (1936). It will not do so here, for the record establishes that respondents object to any accommodation of petitioners' religious practices. Moreover, in all cases the rule adopted below will not avoid constitutional questions because in each case a court will

be required to determine whether the inquiry called for runs afoul of Thomas' constitutionally rooted prohibition on official inquiry into the validity of a religious practice. See, Larson v. Valente, 102 S.Ct. 1673, 1689 (1982) (Stevens, J., concurring).

II. The Compelling State Interest Test Requires a Court to Determine the Factual Impact of a Rule and Such Findings Are Subject to the Clearly Erroneous Rule

The court below departed from well settled principles of both the First Amendment and appellate review when it rejected the factual findings of the District Court that the rule did not, in fact, advance the respondents' interest in safety.

The Court of Appeals escaped the force of the District Court's factual findings by holding that the relevant inquiry was not how the rule functioned in practice, i.e., whether accidents had in fact occurred, but

rather whether respondents, in enacting their rule, believed that the rule would advance safety. The latter inquiry, termed "legislative" by the court below, was held not subject to the clearly erroneous standard ordinarily applicable to the review of factual findings. (2-3b).

A) The Court of Appeals Erred in Not Applying the Clearly Erroneous Rule

The Court of Appeals cited no authority in support of its holding on the inapplicability of the clearly erroneous rule. This Court's opinion in Pullman-Standard v. Swint, 102 S.Ct. 1781, 1789 (1982), makes it unquestionably clear that the Court of Appeals erred:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous."

The notes of the Advisory Committee to Rule 52 state likewise.

See 5A Moore's Federal Practice, 52.01 (4) (1982); Nagle, The Ever Widening Scope of Fact Review in Federal Appellate Courts - Is the Clearly Erroneous Rule Being Avoided, 59 Wash. U. L. Q. 409 (1981). See also Commissioner v. Duberstein, 363 U.S. 278, 291 (1960).

Even assuming the validity of the Court of Appeals' novel distinction, the findings it overturned are not "legislative;" rather, those facts (summarized below) are "historical."*

* The Court of Appeals overturned the District Court's findings that: 1) Yarmulkes secured by bobby pins or clips fall infrequently from the head during basketball play; 2) "Substantial experience" with interscholastic basketball games, and innumerable non-interscholastic play, with players wearing yarmulkes reveals no falls or slips caused by yarmulkes; 3) Soft barrettes are the "functional equivalent" of yarmulkes; 4) The IHSA had absolutely prohibited petitioners' wearing of headcoverings; (continued on next page)

B) The Historical, Not Legislative, Facts Are Relevant in Determining Whether the State Has a Compelling Interest

The more fundamental error of the court below was its focus on respondents' belief in the need for a no headwear rule, as opposed to the District Court's focus on the actual operation of the rule. This shift in emphasis is entirely inconsistent with this Court's Free Exercise decisions. If left to stand, it would eviscerate the protections that clause offers religious dissenters.

The Court of Appeals balanced petitioners' religious beliefs against the IHSA's interest in safety in the abstract (5b). But, as the District Court held,

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(footnote continued)
5) The evidence is uncontroverted "that prohibiting yarmulkes does not serve a 'compelling state interest'"; 6) Respondents eliminated a provision of their rules permitting soft barrettes in order to undercut the court's findings on the TRO; 7) The petitioners' sincere religious beliefs mandated headcoverings at all times, with only the most limited exceptions, none of which is here relevant.

this

> argument involves an impermissible sleight of hand: It falsely equates basketball safety with prohibiting yarmulkes. Basketball safety is of course a legitimate IHSA goal. [T]his lawsuit is about ... not the abstract question of whether IHSA can decree basketball safety, but rather the specific question whether it can prohibit the wearing of yarmulkes and override the exercise of First Amendment rights. (40e).

As to that question, the District Court pointed out the total absence of proof of real, not speculative, hazards and the views of basketball coaches and referees that permitting the wearing of yarmulkes does not create a safety hazard.

In every Free Exercise case there will presumably be "legislative" facts to justify the regulation and the resulting impingement on an individual's rights. But this Court has constantly demanded far more to rebuff a Free Exercise claim.

In Sherbert v. Verner, supra, the state asserted that it could deny Sherbert, whose religion prohibited Saturday work, unemployment benefits for turning down employment which required such work, in order to prevent fraudulent claims. Without denying the significance of preventing such claims, the Court held that the failure to establish as a fact that allowing an exemption for religiously based claims would result in fraudulent claims defeated the state's defense.

McDaniel V. Paty, 435 U.S. 617 (1978), struck down Tennessee's constitutional disqualification of ministers from membership in the legislature. While noting that the state's interest in preventing the establishment of religion was "of the highest order", the Court concluded that Tennessee had "failed to demonstrate that its views of the danger of clergy participation in the political

process have not lost whatever validity they may once have enjoyed". Id. at 628.

There likewise was no question that, in the abstract, Wisconsin had a compelling interest in requiring children to have some secondary school education. Under the rule adopted by the court below, that "legislative" fact would have ended the case. It did not. Instead, in Wisconsin v. Yoder, supra, this Court analyzed in detail the operation of that rule upon the Amish, and the effect upon the state's interest of an exemption for the Amish. Finding no significant likelihood of harm to the state's interest in fact, this Court held for the Amish.

In this case, the record shows even more convincingly than did the records in Sherbert, McDaniel, or Yoder, that, whatever respondents may have thought originally, experience demonstrated that

an exception to the no headwear rule would create only the most remote -- if that -- possibility of harm. Such a remote, hypothetical showing is not sufficient under this Court's cases to discharge the state's burden of justifying an infringement on Free Exercise rights.

CONCLUSION

Whether petitioners are able to compete in interscholastic sports is not, perhaps, of any great moment except to the adolescents involved. But the legal principles invoked by the Court below in deciding that question adversely to the petitioners threaten to deny both the petitioners and all those whose religious practices do not conform to the norm the protections the Free Exercise Clause was intended to confer.

Accordingly, a writ of certiorari should issue to review the judgment below.

Sylvia M. Neil
Shirley R. Dvorin
American Jewish Congress
Suite 2102
22 West Monroe Street
Chicago, Illinois 60603
(312) 332-7355

David A. Grossberg
30 North La Salle Street
Chicago, Illinois 60602
(312) 580-2036

Nathan Z. Dershowitz
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

In the

United States Court of Appeals

For the Seventh Circuit

No. 81-9260

MOSHE MENORA, et al.,

Plaintiffs-Appellees

v.

ILLINOIS HIGH SCHOOL ASSOCIATION, et al.,

Defendants-Appellants.

Appeal from the
United States District Court
for the Northern District of
Illinois, Eastern Division.
No. 81 C 960--Milton I. Shadur, Judge.

ARGUED MAY 17, 1982--DECIDED JUNE 30, 1982

Before CUDAHY, ESCHBACH, and POSNER, Circuit Judges.

POSNER, Circuit Judge.

Interscholastic high school sports in Illinois, including basketball, are conducted under the aegis of the Illinois

High School Association, a private association of virtually all of the state's public and private (including parochial) high schools. A rule of the Association forbids basketball players to wear hats or other headwear, with the sole exception of a headband no wider than two inches, while playing. The principal concern behind this prohibition is that the headwear might fall off in the heat of play and one of the players might trip or slip on it, fall, and injure himself.

This rule is challenged in the present case as an infringement of the religious freedom of orthodox Jews. According to a stipulation between the parties, orthodox Jewish males are required by their religion "to cover their heads at all times except when they are (a) unconscious, (b) immersed in water or (c) in imminent danger of loss

of life." There is no exception for playing basketball. Orthodox Jews who play basketball comply, or at least try to comply, with this requirement by wearing yarmulkes (small skull caps that cover the crown of the head) fastened to the hair with bobby pins. Ordinarily a yarmulke just perches on the head; the bobby pins are an acknowledgment of the yarmulke's instability on a bobbing head. But bobby pins are not a secure method of fastening; yarmulkes fastened by them fall off in the heat of play with some frequency. The Association has interpreted its rule to forbid the wearing of yarmulkes during play; and the plaintiffs in this lawsuit--two orthodox Jewish high schools in Chicago, the members of their interscholastic basketball teams, and the members' parents--contend that this interpretation forces them to choose

between their religious observance and participating in interscholastic basketball, which as it happens is the only interscholastic sport in which the two schools participate.

The district court held that the association is an arm of the state for purposes of the Fourteenth Amendment, that the hazards posed by yarmulkes are too slight to justify putting the plaintiffs to the choice we have just mentioned, and therefore that the rule, as applied to prohibit the wearing of yarmulkes while playing basketball, violates the free-exercise clause of the First Amendment, which was held in Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940), to be applicable to the states by virtue of the due process clause of the Fourteenth Amendment. 527 F. Supp. 637 (N.D. Ill. 1981).

The Association no longer contests the finding that it is an arm of the State of Illinois for purposes of the Fourteenth Amendment. Although the Association is nominally a private organization, public high schools comprise the bulk of its membership and dominate its decisionmaking. Since there is no issue of state action before us, we need not consider the district court's application of the principle of collateral estoppel to bar the Association from denying that it is an arm of the state for purposes of the Fourteenth Amendment. Our silence is not to be construed as approval or disapproval of the district court's analysis of this question.

The First Amendment, so far as is relevant to this case, provides that "Congress shall make no law...prohibiting

the free exercise [of religion]." Read literally (after substituting "Illinois High School Association" for "Congress" and "rule" for "law"), this language would not forbid a regulation secular in purpose (the purpose of the no-headwear rule is to promote safety); general in application; not motivated by antipathy to any religious group on which the regulation might bear heavily or by sympathy for a competing group (there is no suggestion of any such motivation here); and that does not actually prohibit a religious observance but merely makes it more costly by forcing the observant to give up some government benefit (here, participation in an interscholastic sport sponsored by an arm of the state). Wisconson v. Yoder, 406 U.S. 205 (1972), on which the plaintiffs rely heavily, involved a state law that forced Amish chidren to attend school,

contrary to their religion. The counterpart in this case would be a state law that forbade people to cover their heads, wherever they were or whatever they were doing, with no exception for orthodox Jews. Cf. Moskowitz v. Wilkinson, 432 F. Supp. 947 (D. Conn. 1977). The no-headwear rule does not do this; it forces orthodox Jews to choose only between keeping their heads covered and playing interscholastic basketball.

But whatever the literal or for that matter the original meaning of the free-exercise clause, the Supreme Court has interpreted it to require the government, when it can do so without too much cost or inconvenience, to bend its regulations--even when they are secular, general, nondiscriminatory, and do not forbid but merely burden a religious observance--to

spare religious people the painful choice between giving up a part of their religious observance and giving up a valuable government benefit. In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh Day Adventist was fired by her employer because she would not work on Saturdays--her religion forbade her to do so. She applied for unemployment compensation. It was denied on the ground that her refusal to work on Saturdays constituted a failure, without good cause, to accept available suitable work when offered, a condition under state law for receiving unemployment compensation. The Supreme Court held that this denial placed a burden on the plaintiff's exercise of her religion that was disproportionate to the state's interest, described as the avoidance of "fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work...." 374 U.S. at 407.

Sherbert and the cases following it require a comparison of two burdens: the burden on the persor who is seeking a government benefit of being denied the benefit as the price of observing his religion, and the burden on the government of extending the benefit to someone who fails to meet the usual requirements for eligibilty. See, e.g., Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 80 Harv. L. Rev. 1381 (1967); Note, Religious Exemptions under the Free Exercise Clause: A Model of Competing Authorities, 90 Yale L.J. 350, 351-62 (1980). The more valuable the benefit to the claimant and hence the greater the burden on him of forgoing it in order to continue to observe his religion, the greater must be the burden on the government of relaxing the conditions it places on that benefit for a refusal to make an exception for the claimant

to survive a challenge based on the First Amendment. Free exercise of religion does not mean costless exercise of religion, but the state may not make the exercise of religion unreasonably costly.

The benefit that the plaintiffs seek in this case is participation in interscholastic basketball games; for so far as appears the rules of the Illinois High School Association do not forbid the wearing of headwear in any other sport, and anyway the plaintiffs do not want to participate in any of the other interscholastic sports regulated by the association. Windsor Park Baptist Church, Inc. v. Arkansas Activities Ass'n, 658 F.2d 618 (8th Cir. 1981), held that it was not a violation of the free-exercise clause to exclude a Baptist school from participating in all the interscholastic sports sponsored by the Arkansas counterpart to the Illinois High School Association because the school

refused on religious grounds to seek accreditation by state educational authorities as required by state law. But the fact that the burden on the religious observance was greater in Windsor than in the present case is not decisive. We must also compare the burdens on the states of accommodating their interest to those of the religious claimants. As under any balancing test, each case tends to be sui generis, so that the principal value of precendent is to identify the interests that must be weighed and to tell us whether, in weighing them, we should place our thumb on one pan or the other. Sherbert indicates that our thumb should be on the claimant's pan, because it says that the state's interest must be "compelling" to outweigh the claimant's. 374 U.S. at 403, 406. See also Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S.

707, 718 (1981). Yoder, however, suggests that a secular regulation is permissibile unless it "unduly burdens" the free exercise of reigion. See 406 U.S. at 220.

But in the view we take of this case we do not have to choose between these formulations, assuming they really are different. A court, before attempting to balance competing interests, must define them as precisely as it can, since in the process of definition it may become apparent that there is no real conflict. The concept of "false conflict," a major theme in the modern scholarship on conflict of laws, see, e.g., Cavers, The Choice-of-Law Process 89-92 (1965), has, we think, an application to constitutional adjudication in general and to this case in particular. The conflicting claims of church and state are a source of some of the bitterest and most divisive

controversies in our society. Weigh them and choose we shall if we must, but we want first to satisfy ourselves that the claims really are irreconcilable.

The parties have argued this case to us as if the religious obligation that was in conflict with state regulation was an obligation while playing basketball to wear a yarmulke fastened to your hair by bobby pins. But that is not what the stipulation says, and while we are not Talmudic scholars we are reasonably confident, and the plaintiffs' counsel acknowledged at oral argument, that the precise nature of the head covering and the method by which it is kept on the head are not specified by Jewish law. The wearing of a yarmulke--which by its size and position is liable to fall off in any activity involving sudden movement--is conventional rather than prescribed; some orthodox Jews

prefer to wear an ordinary hat instead. The affixing of the yarmulke to the head (more precisely, the hair) by bobby pins is even more obviously a convention rather than a religious obligation and it happens to be an inherently insecure method of keeping the yarmulke attached during basketball play.

If the Talmud required basketball players to wear yarmulkes attached by bobby pins, there would be a conflict with the state's interest in safety. But it does not, so it would seem that all the plaintiffs have to do to obviate the state's concern with safety is to devise a method of affixing a head covering which will prevent it from falling off during basketball play. We are not the people to devise the method--to say that yarmulkes should be equipped with chin straps or sewn to headbands or replaced by some form of

head covering that fits the head more securely. But we are reasonably sure that a secure head covering exists or can be devised at trivial cost without violating any tenet of orthodox Judaism; that, on the facts of this case at least, bobby pins do not implicate First Amendment values.

Of course the Illinois High School Association might decide that its rule forbade even a completely secure head covering (as, indeed, the language of the rule suggests) and might also, if it so concluded, refuse to change the rule. A letter from an official of the Association, and testimony of Dr. Edward Steitz (who we are told is "Mr. Basketball"), provide some support for this supposition, though the point was not pressed below. But if the Association proves to be so obdurate--if it refuses to accommodate the indisputably

sincere beliefs of a religious group though it can do so at no cost to the only objective, safety, that the rule in question is claimed to have--it will be standing on constitutional quicksand. Even if the interest in participating in interscholastic basketball is a slight one, a question we need not decide, it would by definition outweigh the burden on the state of accomodating that interest if there were no burden at all.

But by the same token the plaintiffs would be on weak ground if they claimed a constitutional right to wear yarmulkes fastened insecurely with bobby pins, on the theory that the state has no interest in more secure head coverings. It is true, as the district court found, that the Associations's efforts to prove that insecurely fastened yarmulkes pose a substantial safety hazard were

unconvincing. All it could prove was that yarmulkes fall off basketball players' heads once or twice a game, on average, despite the bobby pins, and that in principle any loose object on the floor can cause a player to slip or trip and thereby fall and injure himself. The Association was unable to produce an authenticated instance of a fall caused by a yarmulke. But we do not consider this failure of proof quite so devastating as the district court did. The state need not await disaster to regulate safety; the effort of the Association to take preventive measures against injury before a history of accidents has been compiled is rather to be commended than condemned. Because the rule, which was drafted by the national federation of state high school associations, is in force in most of the nation and not just in Illinois, experience with interscholastic basketball games in

which players wear yarmulkes has been limited. And falls are such a common part of basketball that when someone does fall no one stops the game to investigate the cause. As a result we do not know how many of the falls that occur in games where players are wearing yarmulkes are due to that fact--we do not even know whether falls are more common in such games than in games where the Association's rule is enforced.

The district court thought the fact that the Association once had an exception to its no-headwear rule for "soft barrettes," and repealed it during the course of this litigation, proves that the Association's concern with the safety hazard posed by yarmulkes is spurious. But the exception was not irrational, so even if it was repealed for purely tactical reasons this would not show that the

Association has no reason to be concerned about loose yarmulkes. Barrettes, which are worn by girls to keep their hair in place, may fall on the floor, just like yarmulkes, but until they do so they keep the wearer's hair out of her eyes and make it less likely that she will collide with someone or fail to see an obstacle on the floor. Eyeglasses, which also are permitted by the Association's rules though they sometimes fall off, reduce the likelihood of a collision or a fall. A headband, the only form of headwear permitted, prevents sweat from getting in the eyes or falling on the floor and making it slippery. Yarmulkes do not have the safety-enhancing properties of barrettes, headbands, and eyeglasses. That is why, incidentally, the no-headwear rule does not violate the equal protection clause of the Fourteenth Amendment just because glasses and

headbands are permitted-- the plaintiffs' alternative ground, not addressed by the district court, for upholding that court's judgment.

While we are unwilling to dismiss as spurious the safety concern behind the application of the Association's rule to yarmulkes fastened only by bobby pins, we do not think it is great enough to justify the state's placing a heavy burden on religious observance. But virtually by definition it has sufficient substance to outweigh a nonexistent burden on religious observance. And the burden would be nonexistent if the only thing the rule forbade was the wearing of an insecurely mounted yarmulke since, as we said earlier, there appears to be nothing in Jewish law that requires that the head covering take that form. If the plaintiffs can totally allay the state's safety concern at zero, or practically zero, cost to them, they

must do so. Otherwise the state's concern, even if relatively slight, will be a compelling interest in relation to the (non)burden on the plaintiffs' religious freedom.

As the plaintiffs had the burden of proving that their First Amendment rights were infringed by the Association's no-headwear rule, we are constrained on this record to conclude that they failed to make out a case and that the judgment in their favor must be vacated. As we have explained, they have no constitutional right to wear yarmulkes insecurely fastened by bobby pins and therefore they cannot complain if the Association refuses to let them do so because of safety concerns which, while not great, are not wholly trivial either. But it does not follow that the complaint should be dismissed. The district court should retain

jurisdiction so that the plaintiffs can have an opportunity to propose to the Association a form of secure head covering that complies with Jewish law yet meets the Associations' safety concerns. If the Association refuses to interpret or amend its rule to allow such a head covering to be worn by orthodox Jews, the district court should then proceed to determine, consistently with the analysis in this opinion, the plaintiffs' right to have the rule enjoined as a violation of their religious freedom.

We put the burden of proposing an alternative, more secure method of covering the head on the plaintiffs rather than on the defendants because the plaintiffs know so much more about Jewish law. The stipulation is singularly unilluminating about the content of that law, and because of the importance of avoiding false conflicts in constitutional adjudication

we deprecate it as a basis for the decision of this case. Read literally, the stipulation would prevent orthodox jews from getting haircuts, would require them to wear a hat or yarmulke to bed (though it could be removed after they fell asleep), and might even forbid them to play basketball while wearing yarmulkes fastened only by bobby pins, given the high probability that the yarmulke will fall off at some point during the game (or during the season) and cause--it would seem--a violation of religious law. To the extent that such questions of religious interpretation prove actually relevant to this case they should be addressed, in the first instance at least, by the plaintiffs when they propose to the Association in the further proceedings that we envisage on remand a more secure method of head covering. And if, despite counsel's representation at oral argument, we are

incorrect in believing that Jewish religious law permits a more secure head covering than a yarmulke fastened only by bobby pins, this also can be raised on remand.

For the additional guidance of the district court we shall consider very briefly its suggestion that the Association has a heavier burden of justifying any restriction that it may place on the free exercise of religion than a formal agency of the State of Illinois would have. The court acknowledged that it had no precedent for this suggestion, and we think it unsound. The Fourteenth Amendment is addressed to state action, and we cannot understand how it could be that the more attenuated was the state's invovement in an alleged violation of constitutional rights the stricter would be its constitutional obligations. It is true that if the

governing board of the Illinois High School Association were elected by the people of Illinois rather than by the (mainly) public schools that comprise the membership of the Association, it would be a more representative, a more popular, institution. But we differ with the district court in thinking that this would entitle it to a lower standard of constitutional scrutiny. The free-exercise clause, like so much else in the Constitution, is designed to protect minorities, and their rights are as much endangered by popular assemblies as by quasi-private voluntary associations--maybe more so. The theory of the Bill of Rights is not Populism; and constitutional law is sufficiently complicated already without separate standards based on the representativeness of the agency alleged to be violating constitutional rights.

VACATED AND REMANDED.

CUDAHY, Circuit Judge, dissenting. I would affirm Judge Shadur's very careful decision in the district court based upon his appropriate findings of fact. See 527 F. Supp. 637. It seems to me that he applied the correct balancing test and properly resolved the question before him in favor of the plaintiffs. I add only a few comments concerning the majority's disposition of this case.

In my view the effective foreclosure of the plaintiffs from interscholastic basketball--their schools' only interscholastic sport--is a significant, if not severe, burden and deprivation. It ill behooves the Illinois High School Association ("IHSA"), dedicated as it is to interscholastic sport, to argue here that "mere" exclusion from basketball is only a de minimis burden on these plaintiffs' religious practie. By putting the

plaintiffs to a choice between "the exercise of a First Amendment right and participation in an otherwise public program," Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 716 (1981), IHSA's no-headwear rule has imposed a significant, albeit indirect burden on religion. See also Sherbert v. Verner, 374 U.S. 398, 404 (1963).

I cannot accept the majority's suggestion that the application of the no-headwear rule in the instant case creates a "nonexistent burden on religious observance." Ante, at 8. On its face the IHSA rule is quite clear: no headwear is allowed except headbands. IHSA's interpretation of the rule has been similarly broad and unyielding. On February 19, 1981, IHSA requested an interpretation of the no-headwear rule from the National Federation of State

High School Associations (the "Federation"), which drafted the rule. IHSA, which has consistently felt itself obliged to accept the Federation's rule interpretations, posed the following question: "Would rule 2-2 allow skull caps to be worn if they were not attached by bobby pins or other types of clips which could be judged as hazardous?" The Federation's response leaves no doubt about the rule's application to yarmulkes: "No. Since headwear, other than a head-band, is illegal the method of attachment is not a concern. If the rules were changed to allow players to wear skull caps, the manner in which they would be attached, or the type of attachment, would be a concern." (Emphasis supplied). Although IHSA's inquiry may have been directed to the potential hazards associated with bobby pins and clips in contrast to yarmulkes,

the conclusive and unambiguous ruling by the Federation was that all headwear, other than headbands, is illegal regardless of the method of attachment. In view of this evidence demonstrating the inflexible position of IHSA, I am unable to say that the plaintiffs alleged a nonexistent burden when they proposed and were denied an exception to the no-headwear rule for yarmulkes secured by bobby pins.

Of course, the plaintiffs are not entitled to an exemption from the prohibition of headwear simply because their religious practice is burdened by ther rule. As the Supreme Court has recently observed:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order ... can overbalance and legitimate

> claims to the free exercise of religion." Wisconsin v. Yoder, [406 U.S. 205, 215 (1972)].

Thomas, supra, at 718. See also United States v. Lee, 50 U.S.L.W. 4201, 4203 (February 23, 1982). Unfortunately, the majority seems to have overlooked these principles when it placed the burden of accomodation on the plaintiffs rather than on IHSA. This may well be the more efficient solution but it does not in my view represent the prevailing law. I thus see no point in remanding this case to require the plaintiffs to initiate the process of accomodation which it is IHSA's responsibility to pursue.

In weighing IHSA's interest in refusing the plaintiffs an exemption from the no-headwear rule, I am not prepared to second-guess Judge Shadur's thorough evaluation of the alleged safety hazards of yarmulkes and bobby pins, an evaluation based in part on a questionnaire broadly

circulated nationally to high school athletic coaches and officials. I am certainly sympathetic to the majority's observation that "[t]he state need not await disaster to regulate safety...." Ante, at 7. But prophylactic measures that burden the free exercise of religion must be justified by something more substantial than speculative assertions of potential injury. As the majority concedes, the record of this case after full trial discloses not even a single instance of a basketball player slipping on or being injured by either a yarmulke or its functional equivalent, a soft barrette (soft barrettes were until the commencement of this litigation permitted under the Federation's rules). In my opinion, this unsubstantiated concern for safety falls woefully short of justifying the rule's burden on the religious practices of the plaintiffs.

I also note that I am not as eager as the majority to condemn Judge Shadur's quite realistic estimate that a narrowly-based high school bureaucracy (even given its good intentions) might be less sensitive to religious liberty values than a popularly elected legislature. To the extent that he actually based his decision on this point, I think Judge Shadur has merely pointed out the political realities.

It may of course be possible that a suitable compromise of this dispute can be reached on the basis of the majority's disposition, and the plaintiffs' clear right in the exercise of their religion may eventually be vindicated. Because I believe that remanding this case and requiring the plaintiffs to take additional affirmative action is both unnecessary and

inappropriate, I respectfully dissent from today's decision.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 18, 1982

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

MOSHE MENORA, et al.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellees	)	
No. 81-2960 vs.	)	
ILLINOIS HIGH SCHOOL ASSOCIATION, et al.,	)	No. 81 C 960
Defendants-Appellants.	)	Milton I. Shadur, Judge.

ORDER DENYING PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The appellees have filed a petition for rehearing with suggestion for rehearing en banc. Since the judges of the original panel have voted to deny the petiton (with Judge Cudahy dissenting), and since none of the judges of the court in regular active service has requested a vote on the petition, it is denied. But we think it may clarify our original opinion to comment briefly on three of the grounds on which rehearing was sought.

We are accused of having failed to apply the clearly-erroneous rule to the district court's finding that insecurely fastened yarmulkes do not pose a substantial hazard to basketball players. That rule, however, is designed for the review of findings of "historical," not "legislative," fact. Legislative facts are those general considerations that move a lawmaking or rulemaking body to adopt a

rule, as distinct from the facts which determine whether the rule was correctly applied. There is no question that insecurely fastened yarmulkes are within the scope of the Illinois High School Association's no-headwear rule; the question is whether the Association's concern with safety is substantial enough to support the rule as so interpreted; and a fact that goes to the reasonableness of a rule or other enactment is a classic example of a legislative fact, to which as we have said the clearly-erroneous standard does not apply.

The petition for rehearing complains that in our opinion we "scrutinize[d] the sincere religious beliefs of the plaintiffs." We did not. We expressed doubt whether the stipulation entered into by the parties provided an intelligible account of those beliefs, but on the

crucial issue of belief--whether Jewish law requires Jewish males to play basketball wearing only insecurely mounted yarmulkes--we relied on the statement of the plaintiffs' counsel at oral argument that Jewish law does not specify the method of head covering and would not be violated by a secure method.

Finally and most important, the petition argues that we placed the burden of "accommodating" competing sacred and secular interests on the religious claimants. We did not. We understand "accommodation" in this context to refer to a giving up in whole or in part of some religious practice, or conversely the giving up in whole or in part of some secular obligation, in order to give effect to the competing interest. If we had held that the Association's concern with safety requires that the plaintiffs abandon either

interscholastic basketball or adherence to the tenets of their faith, that would be requiring the plaintiffs to "accommodate" their religious claims to the interests asserted by the state. But we did no such thing. We placed on the plaintiffs only the burden of demonstrating that there is in fact a conflict between the state's interest in safety and their interest in complying with all the requirements of Jewish law. If they can comply fully with all those requirements yet still meet fully the state's concern with safety, as by wearing a yarmulke securely fastened to the head, then they would not be accommodating their religious beliefs to secular commands because as we have emphasized there appears to be no obligation in Jewish law to cover the head with a cap likely to fall off during basketball play. Only if it should turn out that the plaintiffs cannot devise

a secure head covering that will satisfy simultaneously the requirements of Jewish law and the state's legitimate concern with safety in basketball play would the question of who has the burden of accommodation arise.

Opinion by Judge Posner
Judge Cudahy dissenting
JUDGMENT - ORAL ARGUMENT
United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 30, 1982

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

MOSHE MENORA, et al.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellees	)	
No. 81-2960 vs.	)	
ILLINOIS HIGH SCHOOL ASSOCIATION, and LAVERE L. ASTROTH,	)	No. 81 C 960 Judge Milton I. Shadur
Defendants-Appellants.	)	

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, VACATED and REMANDED, with costs, in accordance with the opinion of this Court filed this date.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 31, 1982

Before

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon.

Hon.

MOSHE MENORA, et al.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellees	)	
No. 81-2960 vs.	)	
ILLINOIS HIGH SCHOOL ASSOCIATION, et al.,	)	No. 81 C 960 Judge Milton I. Shadur
Defendants-Appellants.	)	

On consideration of the "MOTION FOR STAY OF MANDATE" filed herein on August 25, 1982 by counsel for the plaintiffs-appellees,

IT IS ORDERED that said motion is hereby GRANTED and the mandate of this Court is hereby stayed until further order of the Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MOSHE MENORA, et al.,	>	
	>	
Plaintiffs,	>	
	>	
No. 81-2960 vs.	>	
	>	No. 81 C 960
ILLINOIS HIGH SCHOOL ASSOCIATION, et al.,	>	
	>	
	>	
Defendants.	>	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was initially set for hearing November 3, 1981 on plaintiffs' application for preliminary injunction. By agreement of the parties immediately prior to the hearing, the Court ordered the trial of the action on the merits to be advanced and consolidated with the hearing of the preliminary injunction application pursuant to Fed. R. Civ. P. ("Rule") 65(a)(2). This entire action has therefore been tried upon

the facts without a jury. After considering all the evidence and arguments of counsel, in accordance with Rule 52(a) the Court finds the facts and states its conclusions of law as follows.

Findings of Fact

1. Plaintiff Hebrew Theological College, Inc. includes a preparatory division ("Yeshivah") that is a private religious secondary school. Plaintiff Ida Crown Academy ("Academy") is a private religious secondary school operating under the auspices of Associated Talmud Torahs, Inc. Both Yeshivah and Academy teach and adhere to the religious principles of Orthodox Judaism. Each of the minor plaintiffs Sholom Menora, Ronald Alswang, Ronald Bruckenstein, Michael Weiner and Mitchell Sered is (a) a full-time student attending high school at Yeshivah or Academy, (b) a member of the varsity

basketball team of his high school and (c) a member of the Orthodox Jewish faith. Each of plaintiffs Moshe Menora, Gilda Alswang, Rabbi Abraham Bruckenstein, Burton Weiner and Dr. Bernard Sered is a parent of one of the minor plaintiffs.

2. Both the individual minor plaintiffs and other male members of the Orthodox Jewish faith are required in accordance with the tenets and principles of Orthodox Judaism to cover their heads at all times except when they are (a) unconscious, (b) immersed in water or (c) in imminent danger of loss of life. Their religious belief requires such head covering as a sign of respect to God, in whose presence they believe themselves to be at all times. Those beliefs stem from the ancient Talmud, described in Webster's Third International as "the authoritative body of Jewish law and tradition developed

on the basis of the scriptural law...." None of the stated exceptions applies to students playing basketball. Both Yeshivah and Academy require all male students to cover their heads at all the foregoing times, also in accordance with the same religious beliefs.

* 3. It is the sincere religious belief of each of the individual minor plaintiffs that he must cover his head at all times specified in Finding 2 as a sign of respect to God. It is the sincere religious belief of each of the individual plaintiff parents that his or her son should cover his head

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* Each Finding of Fact prefaced by an asterisk is based on the parties' stipulation and is therefore uncontested. All other Findings of Fact are based either on uncontroverted evidence or on a substantial preponderance of the evidence (there is no material controversy on factual issues).

at all times specified in Finding 2 for the same reason.

* 4. Each of the individual minor plaintiffs is a member of a class that comprises all present and future students who attend or will attend Yeshivah or Academy, who are members of the Orthodox Jewish faith whose sincere religious beliefs require them to wear head coverings as stated in Finding 2, but who are prohibited from playing basketball by a rule adopted by defendant Illinois High School Association ("IHSA") unless such class members remove their head coverings and thereby violate the principles of their faith. That class is so numerous that joinder of all its members is impracticable. There are questions both of law and of fact common to the class. Plaintiffs as representatives of the class have fairly and adequately protected all

the interests of the class both in the earlier hearing and in the current hearing in this action.

5. Prosecution of separate actions by individual members of the class referred to in Finding 4 would create a risk of inconsistent or varying adjudications with respect to such individual members that would establish incompatible standards of conduct for IHSA. Moreover, prosecution of such separate actions would create a risk of adjudications as to individual class members that could as a practical matter be dispositive of the interests of the other members not parties to such adjudications or substantially impair or impede their ability to protect their interests. Finally, IHSA has acted on grounds generally applicable to the class, thereby making appropriate injunctive and

declaratory relief with respect to the class as a whole.

6. IHSA is a not-for-profit voluntary association of public and private (both parochial and non-parochial) high schools throughout the State of Illinois. Defendant Lavere L. Astroth ("Astroth") is IHSA's Executive Director[1]. IHSA comprises 835 member schools, 703 of which are public and 132 of which are private. Its funding is derived from an annual membership fee of $25 from each member school plus income derived as a result of sponsoring statewide tournaments, including the Illinois State High School Basketball Championships. All or virtually all Illinois public high schools are dues-paying members of IHSA. With very limited exceptions, all private secondary schools in Illinois are also IHSA members.

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[1] Astroth is joined in this action solely in his official capacity.

To the knowledge of IHSA's Assistant Executive Secretary Donald Robinson ("Robinson"), who testified during the trial (Astroth did not), only one high school in the entire Chicago area (Lake Forest Academy, a private school that was a member through last year and just recently dropped its membership) is a non-member, though Robinson believes there is a possibility that one or two other private schools might not be members.

7. Although it is not itself a formal agency of state government created by the Illinois General Assembly, IHSA regulates and supervises virtually all interscholastic sports in the State of Illinois including basketball. Under IHSA rules no school can play an IHSA member school unless it is also an IHSA member. By reason of the nearly universal Illinois high school membership in IHSA, any school

that is not an IHSA member is effectively excluded from interscholastic competition in the State of Illinois. IHSA's Robinson was aware of no interscholastic activities of Illinois public high schools whatever except under the auspices of and through IHSA.

8. Most IHSA games are played at state-supported schools (primarily on the premises of its public high school members). IHSA organizes and operates the annual state basktball tournament involving all its member schools that is universally known as the "state high school championship." IHSA's annual competition leading to the championship is one of the most prominent sporting events of the year, with the final rounds being played on the University of Illinois varsity basketball court at Champaign-Urbana and televised throughout the state.

9. Yeshivah has been an IHSA member for three years and Academy for eight years, during which periods their respective teams have played in IHSA interscholastic basketball competition. At all times during such interscholastic competition all members of their teams, including plaintiff minors, have worn skullcaps ("yarmulkes") secured by bobby pins, except for two occasions on which such usage by the Academy basketball team was challenged by individual referees who could not be dissuaded from enforcing a rule against such use. On those two occasions no religious leader connected with Academy was present, and the decision to allow team members to play without yarmulkes was made solely by the Academy basketball coach (who had no responsibility for enforcing Academy's rule requiring head covering as referred to in Finding 2). All

other interscholastic games, during which Yeshivah and Academy team members wore yarmulkes without objection or complaint by opposing teams or referees, were officiated by referees certified by IHSA.

10. IHSA interscholastic basketball is the sole interscholastic athletic activity of both Yeshivah and Academy. Interscholastic basketball competition is an important educational experience that contributes to the physical and emotional health and development of students, and elimination of such competition would have a detrimental impact on Yeshivah, Academy and members of plaintiff class. Any prohibition on Yeshivah's and Academy's ability to participate in IHSA interscholastic basketball would have a material negative impact on the schools and upon their students generally, both apart from and in addition to the negative impact

on members of plaintiff class. Playing of interscholastic basketball by Yeshivah and Academy represents to the community at large that those schools are real schools that participate in the mainstream of American life. Such interscholastic play gives the schools and their student body a sense of normality, self-worth and achievement and provides a special outlet for the students' physical and mental needs. IHSA's Robinson confirmed that loss of the opportunity to participate in interscholastic activity would represent a great loss to the students.

11. IHSA is a member of the National Federation of State High School Associations ("Federation"), a voluntary association of organizations in the various states that correspond to IHSA. As part of its activities Federation drafts a set of model basketball rules and related

materials, adoption of which is elective on the part of its member associations. State associations are free to choose which Federation rules they wish to adopt. IHSA has elected of its own volition, though it is not bound, to follow Federation's suggested basketball rules at all times relevant to this litigation.

12. Before this action was instituted Yeshivah and Academy had been participating in their regular season interscholastic basketball league play without hindrance from IHSA and had played in the manner described in Finding 9, with all team members wearing yarmulkes secured by bobby pins throughout all such games. This action was precipitated by IHSA's announced refusal to permit Yeshivah and Academy to participate in the state basketball championship elimination tournament beginning in February 1981 unless the team

played without yarmulkes. At that time IHSA's basketball rule book, which followed Federation's 1980-81 rule book, provided in Rule 2-2 (emphasis added):

> The referee shall not permit any player to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard and unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Barrettes made of soft material are legal. Head bands no wider than two (2) inches made of nonabrasive unadorned, single color cloth, fiber, soft leather, pliable plastic or rubber are legal.

This Court granted preliminary injunctive relief restraining IHSA from enforcing the then rule. During the course of the hearing that led to such relief the Court pointed out, in addition to the First Amendment considerations hereafter dealt with, that no rational distinction appeared

to exist between a soft barrette attached to the hair with bobby pins or clips and a yarmulke similarly attached.

13. After this Court's entry of its preliminary injunction order and while this action remained pending, Illinois communicated with Federation about this litigation and the issues involved. Before that communication Federation had sent a "National Federation Basketball Rules Questionnaire (For Preparing the 1981-82 Rules)" to representative basketball coaches and officials in 44 states including Illinois. That questionnaire asked questions as to (a) whether recent rule changes were satisfactory, (b) calling for some general observations on identified issues and (c) whether a number of possible rule changes would be favored by the addressees. Under the heading "Regarding Recent Changes--Are These Satisfactory?"

question 5 asked about the rule permitting soft barrettes (underlined in Finding 12):

> Stipulating that hair control devices made of soft material may be approved upon examination by the referee.

Over 10,000 responses were received from around the country, 8,766 answering that the rule was satisfactory and 1,476 that it was not.[2] Nevertheless in April 1981

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[2] At the conclusion of the trial in this action, during which several witnesses testified for each side, IHSA introduced without objection the depositions of three witnesses, two of whom were associated with Federation's Basketball Rules Committee. When during the hearing the Court had asked about the circumstances of the 1981-82 Federation rule change hereafter referred to in this Finding, and its relation if any to this litigation, IHSA's counsel responded that the deposition of Bernie Saggau (Chairman of Federation's Basketball Rules Committee) dealt with that issue. This Court's subsequent view of the Saggau deposition during preparation of these Findings and Conclusions noted a reference to a Federation questionnaire in which there had been a vote of 1,766 (sic) "yes" and 1,476 "no" as to soft material hair

control devices (Saggau was clearly disingenuous during his deposition in denying the questionnaire referred to soft barrettes, given the fact that the questionnaire section was about "recent changes" and that the underlined sentence in Finding 12 relating to such barrettes had been the only recent change that dealt with "soft material hair control devices"). When the Court sought to refer to the Exhibits delivered by IHSA counsel, it found that the only one not so delivered was the questionnaire, Exhibit 4 to the Saggau deposition. Upon request by the Court's law clerk IHSA counsel delivered a copy of Exhibit 4 with a forwarding letter referring for the first time to the "typographical error in this [deposition] transcript" in reporting the "yes" vote as 1,766 rather than the actual figure of 8,766. Obviously six-to-one vote from more than 10,000 knowledgeable basketball coaches and officials in favor of retaining the rule permitting soft barrettes (functionally equivalent to yarmulkes in all respects as to safety) has a devastating effect on the "compelling necessity" of a new rule to serve IHSA's stated purpose of prohibiting yarmulkes to assure safety. It is quite apparent that but for the Court's request Exhibit 4 would not have been delivered and, most important, the significant "typographical error" that disclosed the six-to-one vote consequently would never have been brought to the Court's attention.

Federation's Rules Committee changed its rule for the 1981-82 season by eliminating the provision permitting soft barrettes (this was done by deleting the sentence underlined in Finding 12; in the 1981-82 Rulebook what had been Rule 2-2 became Rule 3-4-5, with that one change). Federation's Assistant Director Robert Schindler, who was and is in charge of its basketball rule books and related activities, testified that the principal reason for the change was the difficulty encountered by officials in interpreting the rule--as to what was a "hard" and what was a "soft" barrette. Chairman Saggau of Federation's Basketball Rules Committee testified to the same effect. According to Schindler hard barrettes were viewed as presenting a hazard because of head and face contact. When it reconsidered and changed its rule after this litigation had been instituted,

Federation had no information as to any slippages or injuries having occurred as the result of the wearing of soft barrettes or yarmulkes, although its stated reason for the head covering rule is to promote safety. Federation witnesses, whose depositions were taken before trial and were therefore not available for quesitoning by the Court, were vague (as was IHSA's Robinson) as to the timing and causal nexus between this litigation, the communications from IHSA to Federation and the reversal of the rule change to prohibit soft barrettes. Especially in light of the six-to-one vote from over 10,000 respondents in favor of retaining the soft barrette rule (in response to a questionnaire whose stated purpose was "for preparing the 1981-82 Rules") and the total absence of any information that soft barrettes (or yarmulkes) had in fact caused

any problems of safety, it taxes credulity that the change in the rule was not at least in part responsive to the pendency of this litigation. This Court accordingly finds that the rule change had to be motivated in part by the effort to avoid the impact of the ruling in Finding 12.[3] Under any possible interpretation, for safety and all like purposes a yarmulke is the functional equivalent (although not of course the religious equivalent) of a soft barrette, not a hard barrette.

14. Slips and falls by players are common to the game of basketball. Minor injuries such as skin abrasions or sprained ankles are also common to the game. Such

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[3] This Court's Conclusions of Law would be the same without reference to, or any dependency on, the finding in this last sentence. It is however most troublesome to encounter what appears to be a pretextual basis for the adoption of the current rule.

minor injuries often result from contact with other players and occasionally fans. Federation did no have, nor did IHSA, any information as to a single instance of slippage or a single instance of injury resulting from a yarmulke having come loose and fallen on a basketball court during interscholastic or non-interscholastic play. Federation did not have, nor did IHSA, any information as to a single instance of slippage or a single instance of injury (either to a male or to a female player) from a bobby pin or clip having been worn or having fallen onto a basketball court during interscholastic or non-interscholastic play. Testimony by witnesses with substantial experience in coaching, observing and refereeing basketball games played by one or both teams wearing yarmulkes (such testimony referred to more than 1,300 interscholastic

games and an unidentifiably larger number of non-interscholastic games) reflected not a single instance of either slippage or injury from either yarmulkes or their associated bobby pins or clips.

15. In all the games testified to by the witnesses, or that were the subject of a questionnaire directed by IHSA to its officials who refereed 1980-81 games involving Yeshivah or Academy (that questionnaire was sent after this action was instituted), yarmulkes have become loose and fallen from players' heads onto the basketball court an average of perhaps one or two times per game (often they did not fall at all; no witness remembered more than three such instances during any one of the over 1,300 games). In every instance the yarmulke has promptly been removed from the floor by one of a number of means, including removal by a player or referee

while the ball is in play or by a fan, player on the bench or coach when play stops.

16. Eyeglasses, both unsecured and secured to a player's head by elastic bands, often fall from players' heads onto the basketball court during games. If a player stepped on glasses during game action, his likelihood of slipping and falling would be increased, just as such likelihood would be increased if a player stepped on a yarmulke or any other foreign object on the floor. Foreign objects such as paper and coins are unfortunately thrown by fans onto the basketball court from time to time during basketball games, and paper is from time to time left on the court as a result of the incomplete cleaning up of paper detached from pompoms used by cheerleaders during times out or between halves. IHSA rules do not prohibit persons

wearing glasses from playing IHSA interscholastic basketball. Nor do IHSA rules ban attendance at games or cheerleader participation during games. Slippage often occurs during basketball games due to wet spots on the court (whether the result of players' sweat dropping onto the floor or, more likely, the result of players falling to the floor and leaving a wet area). No IHSA rule requires automatic stoppage of play to wipe up wet spots. Instead the wet spots are not wiped until play stops.

17. IHSA has not in fact adopted all feasible rules to maximize safety during basketball games. During the course of this litigation it changed from a rule that permitted the wearing of soft barrettes (and therefore could not rationally have barred yarmulkes, the equivalent of soft barrettes in every relevant respect) to a

rule that prohibited such soft barrettes. It has adopted that new rule despite (a) the total absence of any evidence of slippage or injury having in fact occurred beacuse of the wearing of soft barrettes or yarmulkes and (b) the very large six-to-one vote received by Federation (whose new rule IHSA simply adopted) favoring retention of the rule permitting soft barrettes.

Conclusions of Law

Neither the Fourteenth Amendment[4] nor 42 U.S.C. §1983 ("Section 1983") imposes a restriction on purely private conduct. Under the Fourteenth Amendment the limitation is on what "any State" shall do, while Section 1983 implicates only action "under color" of state law.

Although IHSA is not directly a creature of the Illinois Constitution or General Assembly, there is no question that the state action requirement is satisfied here. IHSA embraces all Illinois high

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[4] Where as here the consitutional right asserted by plaintiffs is a Bill of Rights provision incorporated by settled case law into the Fourteenth Amendment, it has become customary to refer directly to the underlying Amendment. This opinion will follow that usage and speak of the First Amendment except where, as in this paragraph, language of the Fourteenth Amendment itself is relevant.

school interscholastic activity, not only of the public high schools (the critical fact for state action) but of private schools as well. It sets itself up as conducting the "state high school basketball championship"--and by the combination of universal membership among public high schools[5] and the IHSA rule prohibiting interscholastic competition by its members with non-members, it has kept that promise. Most of its activities are conducted at public schools, with the finals of what everyone knows as the "state tournament" (formerly the Sweet Sixteen, now the Elite Eight) concentrated in a

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[5] According to IHSA's own testimony no public high school is known to be a non-member. Indeed only one private Chicago-area high school (itself a dropout just this year) is a known non-member (IHSA's Assistant Executive Secretary Robinson speculated that there might be one or two other non-public schools outside the fold.)

March weekend at the University of Illinois basketball fieldhouse in Champaign-Urbana.

That congeries of facts plainly comports with the standard established in the "white primary" cases beginning with Smith v. Allwright, 321 U.S. 649 (1944), to support a holding that IHSA'a action is "state action." IHSA fought and lost the same battle in Bucha v. IHSA, 351 F. Supp. 69, 73 (N.D. Ill. 1972). Under the circumstances this Court is prepared to and does exercise its "broad discretion" to apply the doctrine of offensive collateral estoppel as since expressed in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-33

(1979).[6] But even if collateral estoppel were not to apply, this Court reaches the same decision on the merits as did Judge Austin in Bucha, holding that IHSA's action is "state action," so that IHSA must comply with the First Amendment and is therefore within Section 1983.

But IHSA's status as a private party carrying on state action poses another problem not addressed by the litigants. Absolutist First Amendment doctrine, as propounded by Justices Black and Douglas, has not prevailed. Instead the Supreme

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6 Under the tests enunciated by the Supreme Court (see 439 U.S. at 331-32) "there is no unfairness" to IHSA in applying the doctrine. IHSA "had every incentive to litigate the [earlier] lawsuit fully and vigorously." Judge Austin's "judgement in [Bucha] was not inconsistent with any previous decision." Finally, there are "no procedural opportunities available to [IHSA in this case] that were unavailable in [Bucha] of a kind that might be likely to cause a different result."

Court has announced and applied a kind of balancing test. It requires a "compelling state interest" that can "survive exacting scrutiny" to outweigh First Amendment rights, Elrod v. Burns, 427 U.S. 347, 362-63 (1976):

> (1) States must bear the burden of showing the existence of an interest that is "paramount" and "of vital importance" to support encroachment on First Amendment rights.
>
> (2) "It is not enough that the means chosen in furtherance of the [paramount state] interest be rationally related to that end.... If the State has open to it a less drastic way of satisfying its legitimate interests, it must exercise that less restrictive means."
>
> (3) Only then does a court determine, weighing the competing factors, whether the interest secured can overbalance the abridgement of such a fundamental freedom.
>
> (4) If the court finds that the gain to the state "outweighs the loss of constitutionally protected rights," the means employed must be closely drawn, narrow in scope and specific to avoid unnecessary abridgement. Means may not

> be chosen that unnecessarily restrict constitutionally protected liberties.

Unquestionably that measuring process is responsive to concerns about what the Supreme Court has called, in another context, Our Federalism. Under Our Federalism policies of state government enter into the scales with a degree of deference precisely because they are governmentally created.

Here however no real voice of state government has spoken in the same sense at all. We do not deal with an enactment of the Illinois General Assembly or any municipal government. No state court has announced a doctrine that must be given serious attention out of respect for federalism principles. No state executive elected by the people, or appointed by the executive elected by the people, has

promulgated regulations. Rather we have a wholly self-appointed body whose actions, because of all the circumstances, are treated for legal liability purposes as the equivalent of "state action."

This is not the kind of democracy at work that calls for the balancing of interests doctrine to be applied with the same force as in the cases on which IHSA would seek to rely. IHSA is not responsible or responsive to the public will. Its officials take no oath to support the Constitution. One of the reasons for the deference given to state government in First Amendment cases must be the belief that when it acts in its official capacity, its legislators or executives do so with a keen awareness of the respect to be paid to individuals' constitutional rights--particularly the

fundamental principles embodied in the First Amendment.

The Court was not surprised to find no cases discussing this issue. It is relatively rare for a private party to exercise public functions in such a way as to bring state action concepts into play. But the Court is convinced that, for example, had the Supreme Court in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) been called upon to engage in the balancing process (that is, had the conduct of the private restaurateur-lessee been less clearly violative of constitutional rights than a "whites only" rule), the actions of the restaurateur-lessee (deemed "state action" for legal purposes) would not have been given the same weight as decisions of an elected state legislature.

Here the IHSA officials have demonstrated no sensitivity to First

Amendment rights. Their business is after all to regulate basketball play, and if someone's First Amendment rights are infringed by the regulations IHSA's view is that they need not play basketball. IHSA's "legislation" should not be credited with anything like the force that federal courts accord true legislation of elected officials of state government.

Having said all this the Court emphasizes that, as the discussion hereafter will demonstrate, IHSA's rule does not pass the conventional strict scrutiny test in any case. What the preceding discussion goes to is the notion that if any doubt were to exist on that score, it should be resolved against rather and for IHSA.

As already indicated by the brief summation of Elrod v. Burns principles, the Supreme Court teaches that any infringement

of fundamental freedoms must survive the most exacting scrutiny. Free exercise of religion, the right invoked by plaintiffs, is just such a fundamental freedom. Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972). Accord, Sherbert v. Verner, 374 U.S. 398 (1963)

This case presents a striking parallel to Yoder. Plaintiff students share a strong religious belief that covering their heads is mandated out of respect to God. Their parents, Yeshivah and Academy share the same beliefs and a strong desire to have the principles adhered to by the minors. On uncontroverted testimony the minor plaintiffs are faced with material psychological harm from being placed in conflict between their religious beliefs and participation in a student activity, and parents and schools want to avoid those harms. Again the evidence of the

importance of interscholastic play is uncontroverted--it is not simply a desire for athletic activity that could be satisfied by other means. Findings 2 and 10 are conclusive that the issue is one of material significance to plaintiffs that rises to constitutional dimensions.

As against such considerations rooted in the free exercise of religion clause of the First Amenment, IHSA asserts its concern with safety of students. But assertions of such concerns, without any evidence of substantiation, cannot meet the heavy burden of those resisting the assertion of First Amendment rights. Once or twice a game yarmulkes do fall to the playing floor. Of course glasses fall to the floor, other foreign objects come onto the floor--left over from pompon girls' cheerleading, or thrown there by unthinking or criminally negligent fans. This Court

does not minimize the hazards posed by foreign objects--quite the contrary. But IHSA has not legislated away the right of glasses-wearing basketball players because of the risk. On the uncontroverted facts the risks posed by yarmulkes and their appurtenances are totally speculative. Federation received but ignored an overwhelming majority vote from a very wide spectrum of its constituency that would have continued the permissibiity of soft barrettes--indistinguishable in terms of safety from yarmulkes. IHSA slavishly followed Federation in that respect, without any examiniation whatever of whether the risks it now claims are

controlling were real or speculative.[7]

Even apart from the even higher standard than "compelling state interest" that should logically apply to IHSA, the rule does not under the undisputed facts of this case serve such a "compelling

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[7] As previously indicated, this Court has real questions as to the total candor of Federation and IHSA witnesses as to the motivation for the rule change. There is no credible evidence that the soft barrette rule was reversed for safety reasons, for there was absolutely no evidence of any adverse occurrences in the interim--and the speculative harms were no different in 1981-82 than in 1980- 81. Finding 13 and n.2 refer in detail to the Federation questionnaire that materially impairs IHSA's credibility on its own assertions. And the stated problems of rule administration (referees' possible inability to distinguish between a "soft" and a "hard" barrette) cannot serve a "compelling state interest" as to "soft barrettes," which have posed no real safety hazards in fact.

interest."[8] When the additional factor--IHSA's absence of reponsibility of the same nature as public officials--is put into the equation, the conclusion that the rule must be found wanting to overcome First Amendment rights follows a fortiori.

IHSA's argument involves an impermissible sleight of hand: It falsely equates basketball safety with prohibiting yarmulkes. Basketball safety is of course a legitimate IHSA goal, but this Court need not even consider whether that legitimacy represents a "compelling state interest" in constitutional terms. For what this

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8 When 8,766 of 10,424 representative basketball coaches and officials throughout the country (86% of the large number responding)--all of course concerned with basketball safety--find the rule permitting soft barrettes (which could not then allow yarmulkes to be prohibited) satisfactory, IHSA must be viewed as having failed utterly to demonstrate a "compelling interest" in the prohibition.

lawsuit is about is not the abstract question whether IHSA can decree basketball safety, but rather the specific question whether it can prohibit the wearing of yarmulkes and override the exercise of First Amendment rights. As to that question, this Court need not again recount in detail the uncontroverted evidence (principally (1) the total absence of proof of real, not speculative, hazards and (2) the overwhelming views of Federation's informed constituency) that prohibiting yarmulkes does not serve a "compelling state interest."

This Court has reviewed the federal

cases cited by IHSA[9] and finds none of them persuasive. In each of those cases the court found the burden on free exercise of religion to be insignificant in magnitude--de minimis. That is not the case here, for the evidence--entirely credible evidence--is that the burden on plaintiffs is a significant one and Court so finds (see Findings 2 and 10). It

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9 Windsor Park Baptist Church, Inc. v. Arkansas Activities Ass'n, 658 F. 2d 618 (8th Cir. 1981); Walsh v. Louisiana High School Athletic Ass'n, 616 F.2d 152 (5th Cir. 1980); Valencia v. Blue Hen Conference, 476 F.Supp. 809 (D. Del. 1979), aff'd without opinion, 615 F.2d 1355 (3d Cir. 1980). As for Dennis J. O'Connell High School v. Virginia High School League, 581 F.2d 81, 84-85 (4th Cir. 1978), cert. denied, 440 U.S. 936 (1979), that case is wholly inapposite. As the language quoted in IHSA's brief demonstrates, there was "no fundamental right or suspect classification involved" there. Under those circumstances the "rational relationship to a legitimate state purpose" standard applies, not the much higher strict scrutiny test that any First Amendment infringment must meet.

will not do to disparage that claim, for to do so would be much as if those of us who do not share plaintiffs' religious views were to evaluate the importance of those views.[10] Thomas v. Review Board, 101 S.Ct. 1425, 1430-31 (1981) teaches once again that it is impermissible for us thus to search men's consciences. It would be equally wrong for us to reject the serious impact on plaintiffs imposed by IHSA's rule, which would make it impossible for plaintiffs to participate in interscholastic athletics and still exercise their First Amendment rights. At least equally important, in each of the cases IHSA seeks to invoke, the rules

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[10] On that score (the recognition in constitutional terms of plaintiffs' yarmulke-wearing beliefs) see such cases as Goldman v. Secretary of Defense, Civ. No. 81-1522 (D. D.C. July 10, 1981); Gassel v. Adams, No. 78 C 2120 (N.D. Ill. 1978)

involved were found to represent compelling state interests. On the undisputed evidence here the only reason asserted by IHSA to be placed in its balance scale is not at all "compelling."

So we have a balancing process in which the scale favoring those who claim First Amendment rights is far more heavily weighted, and the scale favoring those who seek to infringe those rights is far less heavily weighted, than in the cases on which IHSA seeks to rely. That balancing process produces no contest--in basketball terms IHSA loses by too many points to make keeping score worthwhile.

IHSA's motion for involuntary dismissal under Rule 41(b) made at the close of plaintiff's evidence is of course denied. For the reasons stated in the foregoing Findings of Fact and these Conclusions of Law:

1. This Court confirms its determination made at the time of trial that this action should be, and it has properly been, maintained as a class action in favor of and binding all members of the class referred to in Finding 4.

2. This Court declares that defendants may not bar persons from participating in IHSA-affiliated, sponsored, supervised or controlled interscholastic basketball competition because such persons wear head coverings in accordance with their religious beliefs.

3. Defendants are ordered to allow the minor plaintiffs and all other class members to participate in such interscholastic basketball activity without requiring them to remove such head coverings worn in accordance with their religious beliefs.

4. Defendants, their officers, agents and employees, and all persons in active concert or participation with any of the foregoing who receive actual notice of this Court's order by personal service or otherwise, are permanently enjoined from barring plaintiffs and other class members from participation in such interscholastic basketball activity without requiring them to remove such head coverings worn in accordance with their religious beliefs.

5. This Court retains jurisdiction for purposes of enforcing the foregoing orders and to consider any application for costs and attorneys' fees plaintiffs may hereafter elect to file in accordance with

the prayer of their Complaint.

Milton I. Shadur
United States District Judge

Date: November 17, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MOSHE MENORA, et al.,	>	
	>	
Plaintiffs,	>	
	>	
vs.	>	
	>	No. 81 C
ILLINOIS HIGH SCHOOL ASSOCIATION, et al.,	>	
	>	
	>	
Defendants.	>	

TEMPORARY RESTRAINING ORDER

This matter coming before the court on the complaint and Motion for Temporary Restraining Order filed herein, and upon the argument of counsel for plaintiff for and counsel for defendants against the issuance of a temporary restraining order, it appearing therefrom that unless a temporary restraining order is issued defendants will prohibit Plaintiff Students and Plaintiff Schools from participating in

the Illinois State Basketball Championship Tournament by reason of their wearing religious garb, and that such a prohibition would cause immediate and irreparable injury to said plaintiffs by creating a potential and arguable infringement of their rights to free exercise of religion, and the Court having made findings after a hearing upon oral notice to counsel for defendants, which findings have been stated of record and are incorporated into this order, this court being fully advised in the premises hereof:

IT IS HEREBY ORDERED that:

1. Defendants, their agents, officers and employees, and all persons acting in concert with any of them who receive actual notice of the entry of this order by personal service or otherwise, and each of them, be and hereby are enjoined and restrained from prohibiting any student or

school from participating in the Illinois State Basketball Championship Tournament on grounds that such student wears or such school permits a student to wear a yarmulke (skullcap) securely fastened by bobby pins or other clips, while playing basketball:

2. This temporary restraining order is granted without bond for good cause shown as reflected by the record of the hearing;

3. Defendants are hereby directed to show cause before this court on Oct. 25, 1981, at 9:30 A.M., why plaintiff's motion for a preliminary injunction should not be granted.

4. This temporary restraining order shall expire on March 5, 1981, at 4:30 P.M., unless it is further extended by order of this court.

ENTERED this 23 day of February, 1981, at 4:30 P.M.

/s/ Milton I. Shadur
United States District Judge

(underlined phrase added in writing by District Court)

Office - Supreme Court, U.S.
FILED
DEC 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-830

IN THE

Supreme Court of the United States

October Term, 1982

MOSHE MENORA on behalf of SHOLEM MENORA, a minor; GILDA ALLSWANG on behalf of RONALD ALLSWANG, a minor; RABBI ABRAHAM BRUCKENSTEIN on behalf of RONALD BRUCKENSTEIN, a minor; BERTON WEINER on behalf of MICHAEL WEINER, a minor; DR. BERNARD SERED on behalf of MITCHELL SERED, a minor; HEBREW THEOLOGICAL COLLEGE, INC.; and IDA CROWN ACADEMY OF ASSOCIATED TALMUD TORAHS, INC.; individually and on behalf of all others similarly situated,

Petitioners,

v.

ILLINOIS HIGH SCHOOL ASSOCIATION, an unincorporated association and LAVERE L. ASTROTH, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN G. POUST
WAYNE F. PLAZA
MARGARET S. GARVEY
Xerox Centre, Suite 1500
55 West Monroe Street
Chicago, Illinois 60603
(312) 372-5600
ROOKS, PITTS, FULLAGAR AND POUST
Attorneys for Respondents

No. 82-830

IN THE
SUPREME COURT of the UNITED STATES

October Term, 1982

MOSHE MENORA on behalf of SHOLEM MENORA, a minor; GILDA ALLSWANG on behalf of RONALD ALLSWANG, a minor; RABBI ABRAHAM BRUCKENSTEIN on behalf of RONALD BRUCKENSTEIN, a minor; BERTON WEINER on behalf of MICHAEL WEINER, a minor; DR. BERNARD SERED on behalf of MITCHELL SERED, a minor; HEBREW THEOLOGICAL COLLEGE, INC.; and IDA CROWN ACADEMY OF ASSOCIATED TALMUD TORAHS, INC.; individually and on behalf of all others similarly situated,

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ILLINOIS HIGH SCHOOL ASSOCIATION, an unincorporated association and LAVERE L. ASTROTH, in his official capacity,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the remand of this case to the district court for a hearing as to a safe method of affixing yarmulkes on the heads of Orthodox Jewish students during inter-scholastic basketball competition deprives petitioners of religious liberty in violation of the Free Exercise Clause of the First Amendment to the United States Constitution, given the fact that their religious requirement is only that they wear head covering and that the manner of attachment thereof is not specified by petitioners' religion.

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OPINIONS BELOW

The opinion of the District Court (App. e. of Petition) is reported at 527 F.Supp. 637 (N.D. Ill. 1981). The opinion of the Court of Appeals for the Seventh Circuit and the dissenting opinion (App. a. of Petition) are reported at 683 F.2d 1030 (7th Cir. 1982).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The pertinent provisions of the United States Constitution, Amendment I, and the National Federation of State High School Associations' Basketball Rule 3.5 are set forth in the Petition at pages vi and vii.

STATEMENT OF THE CASE

This case arose as the result of a response by the Illinois High School Association (hereafter "IHSA") to an inquiry

from the petitioner schools about a high school basketball rule (hereafter "Rule 3.5") promulgated by the National Federation of State High School Associations, Basketball Rules Committee. The rule, as it existed at the time of trial and at the present states:

> 3.5 The referee shall not permit any player to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard and unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Headbands no wider than 2 inches made of nonabrasive, unadorned single color cloth, fiber, soft leather, or rubber are legal. Rubber (elastic) bands may be used to control hair.

> Any equipment, which is unnatural and designed to increase a player's height or reach or to gain an advantage, shall not be used.[1]

This rule prohibited the wearing of a skull cap or "yarmulke" attached by bobby pins or clips while a student athlete was playing interscholastic basketball.

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[1]The rules committee previously decided upon a rules change which deleted soft barrettes which, because of girls' competition, had been permitted in the previous wording of the rule. The trial court erroneously, and without any evidence on the subject stated that the yarmulke is the "functional equivalent" of a soft barrette and took the position that the rule change was motivated because of the pendency of this case. This position is not supported in the record.

The minor plaintiffs who were or are students at two Orthodox Jewish high schools and their parents and respective schools sought federal injunctive relief to prevent the application of Rule 3.5 to them or the class they represented (stipulated to be all present and future students at each respective secondary school). Petitioners' claim was that application of Rule 3.5 to them violated their first amendment right to freely exercise their religion.[2]

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[2]At the trial court petitioners also claimed that the rule violated the equal protection clause of the fourteenth amendment. The district court did not address this issue; the court of appeals held that no such violation occurred. Petitioners have abandoned their fourteenth amendment claim in this Court.

A temporary restraining order was entered by the trial court on February 23, 1981. The trial of the action on the merits was consolidated, by agreement of the parties, with the hearing of the preliminary injunction application pursuant to Fed. R. Civ. P. 65(a)(2).

The IHSA is a voluntary association of private and public schools in the State of Illinois. Each member school participates in governing the IHSA through its principal pursuant to by-laws and regulations adopted by a majority vote of the principals. The IHSA is a member of the National Federation of State High School Associations (hereafter "National Federation") which is a voluntary federation of the fifty state associations. The Petitioners voluntarily joined the IHSA and annually

agreed to comply with the by-laws, rules and regulations.

Rules pertaining to an individual sport are developed by the National Federation Rules Committee in concert with the United States Olympic Committee, The National Collegiate Athletic Association and others. The playing rule in question was initially developed and adopted by a joint committee of these organizations.

Petitioner schools have participated in basketball for several years without the student/athletes wearing yarmulkes in all contest games. In 1981, at an early season contest, a referee called to the attention of one school that the yarmulke then being worn violated Rule 3.5.

Requests for an interpretation of the rule were sought by petitioners in light of the fact that they were required by the tenets of their religion to cover their

heads at all times. The National Federation indicated that the basketball rules book already contained the history of the rule and interpretations. When petitioners did not receive an exemption to the rule for the wearing of the yarmulke with the sole method of attachment being bobby pins or clips, they filed this action.

At no time did the IHSA contest the sincerety or correctness of petitioners' belief concerning the requirement of the head covering. Neither the trial court nor the court of appeals inquired into the validity of this belief.

The testimony was undisputed that the purpose of Rule 3.5 is to promote safety. Plaintiffs' testimony did not challenge the rationale, purpose, scope or applicability of the subject playing rule.

Certain exceptions currently in Rule 3.5 are allowed 1) to control hair and 2)

to absorb perspiration, both of which protect the player since neither rubber bands nor sweat bands are known to have ever come off in thousands of games. All other objects are restricted including jewelry, religious medals and other head adornments.

The yarmulke becomes dislodged during basketball games as often as three times per game although some games are played without the yarmulke falling from the head. Petitioners' witnesses conceded that the presence of the yarmulke on the floor increases the possibility of injury. No evidence was presented by petitioners as to whether a method other than bobby pins or clips could be used to secure the yarmulke safely yet not violate the petitioners' religious tenets.

After a trial without a jury the court granted judgment for the plaintiffs and

permanently enjoined the defendants from enforcement of the rule against the plaintiff class.

The Seventh Circuit Court of Appeals reversed, vacated the trial courts's decision and remanded the case for the taking of additional evidence on the issue of whether a more secure head covering could be devised which would satisfy both the religious requirements of petitioners and the state's compelling interest in safety. The court of appeals denied plaintiffs' petition for rehearing with suggestion for rehearing en banc.

REASONS FOR DENYING THE WRIT

The issue in the present case is uniquely narrow, and no amount of puffery by petitioners can convert it into one warranting review by this Court on certiorari. The case does not in any sense broadly concern "novel and unprecedented theor-

ies involving the allocation, as well as the extent of, the parties' burdens in a case raising claims under the Free Exercise Clause". (Petition, p. 13). Nor does it involve an "unprecedented expansion of the scope of appellate review of factual determinations." (Petition, p. 14). The only question raised is whether petitioners met their threshold burden under a first amendment claim of establishing that the challenged state regulation in fact conflicted with their claimed religious practice. The Seventh Circuit Court of Appeals properly held that based on the record below, petitioners failed to make this showing.

I. THE ORDER OF REMAND BY THE SEVENTH CIRCUIT NEGATES ANY REASON FOR THE GRANT OF CERTIORARI

The Supreme Court repeatedly has affirmed the important policy of avoiding constitutional adjudication whenever it is

unnecessary to the resolution of a claim. Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), reh'g denied, 297 U.S. 728 (1936). It was in furtherance of this policy that the court of appeals remanded this case to the district court to create a record which would show that there exists a true conflict between the claimed religious practice of the petitioners in keeping their heads covered at all times, and the claimed interest of the state in the safe play of interscholastic basketball. The court found that based upon the record presented to the district court, the petitioners failed to meet this burden of proof, and that the goals of both parties might be satisfied without resort to constitutional adjudication.

At oral argument, counsel for peti-

tioners informed the court of appeals that the Orthodox Jewish belief specified only that the head be covered; it did not prescribe how the covering was to be affixed to the head. The court of appeals referred this case back to the district court for the taking of evidence with respect to whether there is a safer method of affixing the skullcap than the use of bobby pins, or whether a more secure head covering could be devised to be worn during interscholastic basketball play. If the parties could agree on a method which would satisfy the religious requirements of the petitioners and still assuage the safety concerns of the respondents, a constitutional question could be avoided.

The IHSA has let it be known to the petitioners, and reiterates here for the record, that if the petitioners propose a

secure form of head covering which will also comply with their religious requirements, the IHSA will interpret the National Federation rule to allow such a head covering to be worn during interscholastic basketball play in Illinois, regardless of how it may be interpreted elsewhere. To date, petitioners have refused to propose any such means of securely covering their heads.

It is abundantly clear that the concern with the safety and protection of yet uninjured young men prompted the court of appeals to ask the parties to make the inquiry as to alternate means of attachment of the yarmulke. We respectfully submit that the Court can take judicial notice of e.g. the widely publicized increase in quadraplegic and other serious injuries in football which has caused sporting equip-

ment manufacturers to withdraw from manufacturing football helmets. The grim aspects of life as a quadraplegic or paraplegic may also be judicially noticed. If even one of these tragedies or other less serious injuries can be eliminated by fastenings other than bobby pins or clips, for example attachment to head sweat bands or other similar means, then at least this should be explored as ordered by the court of appeals.

Respondents are puzzled as to the persistence by the petitioners of pursuing what appears to remain as an imagined rather than a real grievance with the IHSA and with the Seventh Circuit Court of Appeals. We here express the hope that the petitioners will recognize the benefits of cooperatively exploring, as the Seventh Circuit Court of Appeals suggested, the most

reasonable way in which the obligation to cover the head while engaging in inter-scholasitic basketball play may be exercised so as to accommodate the state's interest in preventing accidents. If yarmulkes are to be worn, the important consideration is the elimination of a potentially unsafe method of attachment, and a non-intransigent exploration of what methods of attachment are least likely to produce accidental injury.

Because petitioners can in all likelihood get the full relief that they seek by proposing to the IHSA a safe means of attaching the yarmulke, or proposing an alternate secure form of head covering, it is unnecessary that this Court decide any issue raised in this Petition.

If this litigation cannot be terminated by mutual agreement, the district

court retains jurisdiction to take additional evidence upon the question of the suitability of an alternate means of head covering. Presumably, after such a hearing, the court can order either the type of attachment to keep the yarmulke in place other than bobby pins, or it can specify a different secure form of head covering.

II. THE ISSUES PRESENTED IN THE PETITION ARE NOT RAISED IN EITHER THE DECISION OR RECORD BELOW

Although petitioners offer three questions for review, the issues posed can be divided into two themes. In question one petitioners assert that the court of appeals improperly allocated the burden of proof in a free exercise of religion claim. The second and third questions take exception to the manner in which the court of appeals analyzed the record presented in the district court. However, neither the

decision below nor the record raises the issues posed by the questions presented in the Petition.

In their petition for rehearing with suggestion for rehearing en banc filed with the Seventh Circuit, petitioners raised substantially the same questions as are raised in the petition for certiorari filed with this Court. Indeed, the Petition here raises no new issues. The petition for rehearing claimed that the court of appeals disregarded the record and overturned the district court's findings of fact without applying the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. It also claimed that the court unconstitutionally placed the burden of accommodation on the plaintiff religious observers. The petition for rehearing also made explicit the claim that petitioners imply here, that

the decison of the court of appeals was based upon an improper scrutiny of the sincerity of the petitioners' religious beliefs.

In its published opinion denying the petition for rehearing, the Seventh Circuit addressed each of the concerns raised herein. This opinion leaves no doubt that the court did not base its decision on the allegedly impermissible grounds which form the foundation of the Petition for Certiorari.

On the issue of changing the burden of proof the court of appeals stated as follows:

> Finally and most important, the petition argues that we placed the burden of "accommodating" competing sacred and secular interests on the religious claimants. We did not. We understand "accommodation" in this context to refer to a giv-

> ing up in whole or in part of some religious practice, or conversely the giving up in whole or in part of some secular obligation, in order to give effect to the competing interest. If we had held that the Association's concern with safety requires that the plaintiffs abandon either interscholastic basketball or adherence to the tenets of their faith, that would be requiring the plaintiffs to "accommodate" their religious claims to the interests asserted by the state. But we did no such thing. We placed on the plaintiffs only the burden of demonstrating that there is in fact a conflict between the state's interest in safety and their interest in complying with all the requirements of Jewish law.

683 F.2d 1030, 1036-37 (emphasis added).

The court also noted in its opinion that it did not apply the standards of Rule 52(a) only to those facts which the court considered to be "legislative," that is, a fact that goes to the reasonableness of a rule or other enactment, to which the clearly erroneous standard does not apply.

There is nothing to indicate that the dictates of Rule 52(a) were not applied to the subsidiary facts.

III. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND ANY DECISION OF THIS COURT

In an attempt to elevate this case to a level worthy of consideration by this Court, petitioners claim that the decision of the court of appeals is in conflict with Wisconsin v. Yoder, 406 U.S. 205 (1972), Thomas v. Review Board of the Indiana Employment Security Div., 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963). The issue where the conflict arises, according to the petitioners, is the allocation of the burden of proof in a first amendment claim. (Petition, pp. 14, 15).

As discussed above, in the opinion denying the petition for rehearing, the

court of appeals specifically disavowed any claim that it had altered the parties' burden of proof.

> If we had held that the Association's concern with safety requires the plaintiffs abandon either interscholastic basketball or adherence to the tenets of their faith, that would be requiring the plaintiffs to "accommodate" their religious claims to the interests asserted by the State. But we did no such thing. We placed on the plaintiffs only the burden of demonstrating that there is in fact a conflict between the State's interest in safety and their interest in complying with all the requirements of Jewish law . . . Only if it should turn out that the plaintiffs cannot devise a secure head covering that will satisfy simultaneously the requirements of Jewish law and the state's legitimate concern with safety in basketball play would the question of who has the burden of accommodation arise.

683 F.2d at 1037 (emphasis added).

Petitioners characterize the relevant holdings of Wisconsin v. Yoder, Thomas v.

Review Board, and Sherbert v. Verner, as imposing on a plaintiff the singular burden "of demonstrating a conflict between a religiously motivated practice and a some governmental requirement." (Petition, p. 14). A simple reading of the opinion of the court of appeals here shows that this singular burden is all that was required of these petitioners. The Seventh Circuit required only that petitioners demonstrate a conflict between a religiously motivated practice and a governmental regulation. It was the failure of the petitioners to make the initial showing of a conflict which caused the court of appeals to vacate and remand the decision to the district court. Thus, there is no conflict of decisions involved in this case.

In an attempt to raise this case to the magnitude required for the grant of a writ

of certiorari, petitioners distort the holding of the Seventh Circuit and contend that it will result in courts passing upon the correctness of plaintiffs' practice of their religious beliefs. (Petition, pp. 20-21). Such an inquiry admittedly is forbidden by Thomas v. Review Board. Here, however, the correctness of petitioners' belief that they must cover their heads at all times was never challenged by respondents. The Seventh Circuit decision denying the petition for rehearing disposed of the unfounded claim that they questioned the correctness of this belief.

> The petition for rehearing complains that in our opinion we "scrutinzed the sincere religious beliefs of the plaintiffs." We did not. We expressed doubt whether the stipulation entered into by the parties provided an intelligible account of those beliefs, but on the crucial issue of belief --whether Jewish law requires Jewish males to play basketball wearing only

> insecurely mounted yarmulkes -- we relied on the statement of the plaintiffs' counsel at oral argument, that Jewish law does not specify the method of head covering and would not be violated by a secure method.

683 F.2d at 1036 (emphasis added).

Had the court of appeals not been assured by counsel for the petitioners that the means of attaching the yarmulke was not specified by the Orthodox Jewish faith, the court would not have questioned the mode of attachment. Because there was no inquiry into the correctness of the petitioners' religious beliefs, there was no violation of Thomas.

IV. NO NEW QUESTION OF FEDERAL CONSTITUTIONAL LAW IS INVOLVED IN THIS CASE, NOR HAVE PETITIONERS BEEN DENIED ANY CONSTITUTIONAL RIGHT

This case involves simply the constitutionality of a high school basketball rule which prohibits during interscholas-

tic play the wearing of head decorations or head gear. In its current posture, the issue presented to this Court is whether or not the court of appeals properly found that the plaintiffs failed to meet their burden of proving that their first amendment rights were infringed by the application of this rule to them.

On the one hand, petitioners acknowledge that participation in interscholastic athletics is not "of any great moment except to the adolescents involved." (Petition, p. 28). Yet on the other hand petitioners assert that failure of this Court to address the claimed errors of the court of appeals "threaten[s] to deny" not only petitioners, but all religious minorities, the protections of the free exercise clause. (Petition, p. 28). This transparent inconsistency demonstrates the

inadequacy of the Petition. The decision of the court of appeals simply cannot be read as petitioners claim.

No amount of strained semantics can disguise the fact that there is no new question of federal constitutional law involved in this case. This Court has made it clear that the conclusion that there is a conflict between a religious practice and a state regulation is only the beginning and not the end of the inquiry in a first amendment free exercise claim. United States v. Lee, U.S., 102 S.Ct. 1051, 1055 (1982). Whether or not a challenged statute or regulation will be held to violate the free exercise clause depends on the degree of the burden imposed on the religious practice. Wisconsin v. Yoder. The Seventh Circuit Court of Appeals in this case correctly found that

the petitioners failed to establish a conflict, the threshold requirement of proving a claim for violation of the free exercise clause.

The cases which are controlling in this action are those which raise free exercise of religion challenges to actions by bodies regulating voluntary athletic activities. In each of these cases the first amendment claim was rejected because the burden on the free exercise of religion in the athletic area, particularly interscholastic athletics, is de minimus under the uniformly applied tests of Wisconsin v. Yoder, and United States v. Lee. See, e.g., Walsh v. Louisiana High School Athletic Association, 616 F.2d 152 (5th Cir. 1980) reh'g denied 621 F.2d 440, cert. denied, 441 U.S. 1124 (1981); Windsor Park Baptist Church, Inc. v. Arkansas Activ-

ities Association, 658 F.2d 618 (8th Cir. 1981); Valencia v. Blue Hen Conference, 476 F.Supp.809 (D.Del. 1979), aff'd mem., 615 F.2d 1355 (3rd Cir. 1980); Cooper v. Oregon School Activities Association, 52 Ore.App. 425, 629 P.2d 386 (1981); Harris v. New York State Athletic Commission, 56 App.Div.2d 835, 392 N.Y.S. 2d 70 (2nd Department 1977). Petitioners offered no authority contrary to this line of cases which in situtations comparable to that presented here has found that whatever burden may be imposed upon the free exercise of religion by the interscholastic athletic association rule is other than de minimus.

V. THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO THE EVIDENCE PRESENTED TO THE DISTRICT COURT

By selecting and discussing a distinction mentioned by the court of appeals as

to "historical" versus "legislative" facts, the petitioners would have this Court ignore the record as a whole. That record clearly demonstrates that the requirements of Rule 52(a) were met in the instant case.

Rule 52(a) is inapplicable to the mixed questions of law and fact presented in the record and to the ultimate conclusion of the case, that the plaintiffs failed to demonstrate that their religious practice was infringed by the operation of the National Federation rule. See, Pullman-Standard v. Swint, U.S. , 102 S.Ct. 1781, 1790 n.19; K & M Joint Venture v. Smith International, Inc., 669 F.2d 1106 (6th Cir. 1982); S.E.C. v. Bausch & Lomb, Inc., 565 F.2d 8 (2d Cir. 1977).

Respondents contended in the court of appeals that the district court applied an

incorrect legal standard in measuring the constitutionality of Rule 3.5. Specifically, the district court held the IHSA to a heavier burden of justifying any restriction that it may place on the free exercise of religion than a formal agency of the State of Illinois would have. The court of appeals found the district court's reasoning on this issue to be "unsound." 683 F.2d at 1036. Where, as here, an improper legal standard is applied by the district court, the "clearly erroneous" requirement of Rule 52(a) no longer circumscribes appellate review. Kentucky Fried Chicken v. Diversified Packaging, 549 F.2d 368 (5th Cir. 1977).

While it is unnecessary to reach the clearly erroneous question, to the extent that Rule 52(a) is applicable to this case, a brief review of the record demonstrates

that the clearly erroneous standard was satisfied.

At trial the IHSA presented unrefuted expert testimony that the purpose of the rule in question was safety. Plaintiffs' testimony did not challenge the rationale, purpose, scope or applicability of Rule 3.5.

As Dr. Edward Steitz, often referred to as the present day father of basketball testified, he is "without doubt" that the wearing of a yarmulke, with which he is familiar and has had occasion to wear in the manner commonly affixed, would present a potential danger if allowed to be worn during basketball play. As a player, coach, olympic committee representative and basketball rules interpreter, he drafted the original Rule 2.2 and supports the present Rule 3.5.

Petitioners' testimony was that yar-

mulkes fall off during basketball play as often as three times a game. Petitioners' witnesses uniformly conceded that the presence of a yarmulke on the floor, like any other extraneous object, increases the probability of slipping and falling.

The IHSA presented unrefuted expert testimony at trial that a yarmulke having fallen to the court surface causes a 60-65 percent reduction or loss of traction between a basketball shoe and a wood playing surface irrespective of the type of yarmulke being worn. The consequence is unexpected or "surprise" falls with a "surprise" fall likely resulting in a greater number of more serious injuries. Frequent and sharp turns which occur during competition, in a limited area where one's attention is on the ball and not playing surface, substantially increase the risk of harm.

The petitioners did not present any expert's testimony in the sports field, particularly basketball, or in the field of physics. Yet the trial court apparently ignored testimony of Mr. Saggau and Dr. Steitz, two noted basketball and sports experts, and Dr. Willis, an engineer who studied friction coefficients and other physical phenomenon relevant to basketball.

Plaintiffs' testimony did not consist of the named plaintiffs nor any medical expert, yet the trial court assumed emotional harm to the plaintiffs. This finding of emotional injury could only have been based on the testimony of a single witness, Rabbi Blanchard, who became principal of one of the schools only six months prior to the filing of this action. Rabbi Blanchard described what he believed would be the

views of his students if they could no longer play interscholastic basketball under the auspices of the IHSA. He acknowledged that he conducted no study of his students in concluding what would be their views and attitudes.

By ignoring the factual testimony, and applying a novel legal standard, the trial court ruled for the petitioners, and held that the IHSA's concerns were vague and speculative and did not constitute a compelling interest.

The court of appeals did no more than accept the facts as presented by the parties and apply the correct legal standard to those facts, when it reversed the district court decision. Since no evidence was available as to whether an alternative method of attachment would or would not violate Orthodox Jewish beliefs,

the court of appeals remanded the case with direction to ascertain whether an alternative means of attaching the yarmulke is available which would not present a safety hazard.

When the record is viewed as a whole, it is apparent that the dictates of Rule 52 (a) were met. Petitioners' attempt to transform the court of appeals' characterization of the facts into a basis for the grant of a writ of certiorari should be rejected.

CONCLUSION

United States Supreme Court Rule 17 provides that review on a writ of certiorari is not a matter of right and will be granted only when there are special and important reasons therefore. Respondents respectfully contend that no special or important questions are raised in the

Petition here. The Seventh Circuit Court of Appeals applied the proper rules of law to the facts presented to the district court in finding that petitioners failed to meet their burden of proving a violation of the free exercise clause of the first amendment.

For the reasons stated above this case presents no question justifying further judicial review. Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted,

John G. Poust
Wayne F.Plaza
Margaret S. Garvey

Counsel for Respondents

ROOKS, PITTS, FULLAGAR AND POUST
Xerox Centre, Suite 1500
55 W. Monroe Street
Chicago, Illinois 60603
(312) 372-5600

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No. 82-830

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ALEXANDER L. STEVAS
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In the Supreme Court of the United States

October Term, 1982

MOSHE MENORA on behalf of SHOLEM MENORA, a minor; GILDA ALLSWANG on behalf of RONALD ALLSWANG, a minor; RABBI ABRAHAM BRUCKENSTEIN on behalf of RONALD BRUCKENSTEIN, a minor; BERTON WEINER on behalf of MICHAEL WEINER, a minor; DR. BERNARD SERED on behalf of MITCHELL SERED, a minor; HEBREW THEOLOGICAL COLLEGE, INC.; and IDA CROWN ACADEMY OF ASSOCIATED TALMUD TORAHS, INC.; individually and on behalf of all others similarly situated,

Petitioners,

v.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

SYLVIA M. NEIL
SHIRLEY R. DVORIN
American Jewish Congress
22 W. Monroe Suite 2102
Chicago, Illinois 60603
(312) 332-7355

DAVID A. GROSSBERG
30 North LaSalle Street
Chicago, Illinois 60602
(312) 580-2036

NATHAN Z. DERSHOWITZ
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

Counsel for Petitioners

No. 82-830

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1982

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PETITIONERS' REPLY BRIEF

REPLY BRIEF

Respondents, in their Brief in Opposition, have egregiously gone outside the record to suggest that no controversy remains in this case. As this characterization of the case is inaccurate and misleading, petitioners are compelled to reply.

Following the Seventh Circuit's vacate and remand decision, respondents suggested that petitioners should make out of court recommendations of forms of headcoverings which, to respondents' satisfaction, might comply with the Court of Appeals' majority opinion. This post appellate suggestion to set up respondents and their experts in place of the District Court is inadequate not only because it is even less than the remedy the majority provides, but more importantly, because neither the respondents' offer nor the majority decision have

eliminated the controversy here.

The majority and respondents maintain that by shifting onto the petitioners the burden of finding a headcovering that 1) "never" falls off; 2) is not otherwise unsafe; 3) at "zero cost" to petitioners; and 4) otherwise does not violate petitioners religious beliefs and practices, this controversy is eliminated. We vigorously disagree.

Finding an absolutely risk free headcovering with no adverse effect on petitioners' rights is indisputably a heavy burden, probably insurmountable, regardless of the respondents' (and the majority belows') outside the record speculations. Furthermore, is not subjecting Orthodox Jewish boys to likely ridicule in the community by forcing them to wear bizarre headwear while playing interscholastic basketball "a

cost" to petitioners, especially where the safety hazards posed by their discreet bobby pin or clip secured yarmulkes have been known and proven to be merely speculative?

Throughout this case the respondents' unyielding position has been the absolute prohibition of religiously mandated headwear regardless of securement. Their very recent posture is understandable in light of the Seventh Circuit's statement that the respondents would be on "constitutional quicksand" if they would "prove to be so obdurate" as to refuse to accommodate petitioners if petitioners could show a means of accommodating their religious beliefs at "no cost to the only objective, safety." However, the controversy remains that the method of accommodating petitioners' beliefs at "no cost to safety" was already found as fact by

the District Court after full evidentiary hearing, and the Court of Appeals has attempted to overturn such findings without applying the clearly erroneous rule.[1]

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1. The record relied upon by the District Court included the substantial history of literally thousands of basketball games played by players wearing yarmulkes secured with bobby pins or clips, including direct testimony by the chairman of the New York Metropolitan Yeshivah High School Athletic League whose 15 member teams all play with yarmulkes fastened with bobby pins, and the affidavit of the assistant athletic director at Yeshivah University for which the Eastern Collegiate Athletic Conference (part of the NCAA) waived its headwear ban as it applied to yarmulkes. There was not a scintilla of evidence in the whole record that indicated anyone ever witnessed or heard of even one single slip, fall, or injury caused by yarmulkes or the pins or clips which secure them to the head during basketball play.

The majority below did not impliedly apply the clearly erroneous rule, as the respondents argue.[2] Indeed, in its second opinion, the majority expressly admits that it did not do so, and enunciates a novel doctrine justifying its actions.

Petitioners agree with the dissent below that in light of the clear record, the District Court's careful findings of fact and this Court's dictates on burden of proof, the majority should not have vacated and remanded the District Court's decision, since "requiring the (petitioners) to take additional affirmative

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2. Under this Court's dictates pronounced in Pullman-Standard v. Swint, - U.S. -, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982), the clearly erroneous rule must be expressly and thoroughly applied by the Court of Appeals. Implication is not sufficient.

action is both unnecessary and inappropriate." For the foregoing reasons and those stated in our Petition, petitioners reiterate that this case presents important, novel questions justifying this Court's review. Petitioners further note that the controversial argument raised by respondents that first amendment rights can be disregarded as de minimus is yet another reason this case is of such compelling importance that a writ of certiorari should issue.

Respectfully submitted,

SYLVIA M. NEIL
SHIRLEY R. DVORIN
DAVID A. GROSSBERG
NATHAN Z. DERSHOWITZ
Counsel for Petitioners

American Jewish Congress
22 W. Monroe St., Suite 2102
Chicago, Illinois 60603
(312) 332-7355